No. 87-1555

FILED

MAR 17 1988

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHAITMAN
MARC RICHMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

B. WAYNE VANCE
General Counsel
Department of Transportation
Washington, D.C. 20590

S. MARK LINDSEY
Chief Counsel

GREGORY B. MCBRIDE
Assistant Chief Counsel

DANIEL CAREY SMITH
Deputy Assistant Chief Counsel
Federal Railroad Administration
Washington, D.C. 20590

QUESTION PRESENTED

Whether regulations promulgated by the Federal Railroad Administration—mandating blood and urine tests of railroad employees who are involved in certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents, and rule violations—violate the Fourth Amendment on the ground that they do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to the testing.

II

PARTIES TO THE PROCEEDINGS

The petitioners are James H. Burnley IV, Secretary of the Department of Transportation; and John H. Riley, Administrator of the Federal Railroad Administration. The respondents are the Railway Labor Executives' Association; the United Transportation Union General Committee of Adjustment, the Southern Pacific Company; the Brotherhood of Locomotive Engineers General Committee of Adjustment, the Southern Pacific Company; and the Brotherhood of Railroad Signalmen.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulations: Page

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of James H. Burnley IV, Secretary of the Department of Transportation, and John H. Riley, Administrator of the Federal Railroad Administration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals declaring the regulations unconstitutional (App., *infra*, 1a-49a) is not yet reported. The opinion of the district court (App., *infra*, 50a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1988. A petition for a writ of certiorari is due on May 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Pertinent excerpts from the regulations involved in this case are reproduced in the appendix to the petition (App., *infra*, 57a-78a).

STATEMENT

Finding that "alcohol and drug use is sufficiently common to pose a significant safety problem" (50 Fed. Reg. 31514 (1985)), the Federal Railroad Administration (FRA) has promulgated detailed regulations intended "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" (49 C.F.R. 219.1(a)). Subpart C of those regulations generally requires railroads to conduct blood and urine testing of railroad employees who are directly involved in certain train accidents or fatal incidents. Subpart D of the regulations authorizes (but does not require) railroads to administer breath and urine tests after certain accidents, incidents, or rule violations.

By divided vote, the United States Court of Appeals for the Ninth Circuit held that Subparts C and D of the FRA regulations are unconstitutional under the Fourth Amendment, because they do not require a showing of "particularized suspicion" before a drug or alcohol test may be performed. Petitioners seek review of the court of appeals' unwarranted decision.

1. Section 202(a) of the Federal Railroad Safety Act of 1970, 45 U.S.C. 431(a), authorizes the Secretary of Transportation and, by delegation, the FRA, to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." On July 5, 1983, pursuant to that authority (see 48 Fed. Reg. 30723 (1983)), the FRA commenced a rulemaking process that culminated, two years later, in the promulgation of regulations governing the control of alcohol and drug abuse in railroad operations.

When it initiated that rulemaking effort in 1983, the FRA articulated the pressing safety issues that prompted its concern. "Alcohol impairment and drug impairment," the agency observed, "have been identified as causal or contributing factors in a number of train accidents and employee fatalities over the past ten years" (48 Fed. Reg. 30723 (1983)).[1] The FRA noted (*id.* at 30726) that "[d]uring the period from 1972 to date, the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor." "Those accidents," the FRA stated (*ibid.*),

[1] For example, the agency cited a 1979 statistical study of alcohol abuse by employees on seven railroads that employed almost half of the nation's railroad workers. That study showed that "19% of all employees were 'problem drinkers' "; "23% of operating personnel were 'problem drinkers' "; "[o]nly 4% of problem drinkers were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures"; "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year (1978)"; "13% of workers reported to work at least 'a little drunk' one or more times during that period"; "13% of operating employees drank while on duty at least once during the study year, averaging about 3 such instances during the year"; and "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year." 48 Fed. Reg. 30724 (1983).

"resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately $27 million in 1982 dollars)." The FRA also identified (*ibid.*) "an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor."[2] The agency noted (*id.* at 30723) that it had historically "worked in concert with rail labor and management leaders to improve carrier rules programs and employee assistance programs," but it found that "past FRA efforts to promote voluntary action by the railroad industry to address this problem ha[d] not met with uniform success."

On August 2, 1985, after reviewing extensive comments from representatives of the railroad industry, labor groups, and the general public, the FRA promulgated the regulations that are at issue in this lawsuit.[3] The regulations consist of six subparts and are generally intended "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" (49 C.F.R. 219.1(a)). Subparts C and D of the regulations

---

[2] The FRA noted, moreover (48 Fed. Reg. 30726 (1983)), that the available figures significantly understated the extent of the problem, since the threat of being held liable in tort and the risk of losing one's job discouraged the railroads and employees from accurately reporting the cause of accidents.

[3] Comments received by the agency during the rulemaking process "confirmed that alcohol and drug use does occur on the railroads with unacceptable frequency, despite existing rules and programs. Available information from all sources, including FRA safety investigations, suggests that the problem includes 'pockets' of drinking and drug use involving multiple crew members (before and during work), sporadic cases of individual employees reporting to work impaired, and repeated drinking and drug use by individual employees who are chemically or psychologically dependent on those substances." 49 Fed. Reg. 24253-24254 (1984).

(App., *infra*, 58a-78a), in particular, establish procedures for testing railroad employees for drug and alcohol impairment whenever they have been directly involved in certain train accidents, incidents, or serious safety rule violations.[4]

Subpart C (49 C.F.R. 219.201 to 219.213), entitled "Post-Accident Toxicological Testing," provides (49 C.F.R. 219.203(a)) that railroads "shall take all practicable steps to assure that all covered employees of the railroad directly involved * * * provide blood and urine samples for toxicological testing by FRA" after any one or more of the following circumstances: a "major train accident"—defined as one which includes either a fatality, the release of hazardous material accompanied by an evacuation or reportable injury, or damage to railroad property of $500,000 or more (49 C.F.R. 219.201(a)(1)); an "impact accident" (collision) that results in a reportable injury or damage to railroad property of $50,000 or more (49 C.F.R. 219.201(a)(2)); or a "train incident that involves a fatality to any on-duty railroad employee" (49 C.F.R. 219.201(a)(3)). Railroads are required to "make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident" (49 C.F.R. 219.203(b)(1)). Toward that end, employees must "be transported to an independent medical facility where the samples shall be obtained" by qualified medical personnel

---

[4] In addition to the testing procedures, Subpart A sets out some general provisions (49 C.F.R. 219.1 to 219.21), Subpart B states a general prohibition of alcohol and drug use (49 C.F.R. 219.101, 219.103), Subpart E establishes policies for identifying alcohol and drug abusers and referring them for treatment (49 C.F.R. 219.401 to 219.407), and Subpart F creates a system for pre-employment screening (49 C.F.R. 219.501 to 219.505). Respondents did not challenge those additional subparts of the regulations in the present lawsuit.

(49 C.F.R. 219.203(c)(1)). The regulations also establish procedures for collecting and handling the samples (49 C.F.R. 219.205). In addition, the FRA is required to notify employees of the results of the tests and to afford them an opportunity to respond in writing prior to the preparation of any final investigative report (49 C.F.R. 219.211(a)(2)). Employees who refuse to provide required blood or urine samples may not perform covered service for a period of nine months, but they are entitled to a hearing concerning their refusal to take the test (49 C.F.R. 219.213)).[5]

Subpart D of the regulations (49 C.F.R. 219.301 to 219.309), entitled "Authorization to Test for Cause," authorizes (but does not require) railroads to mandate breath or urine tests (but not blood tests) for covered employees under the following circumstances: in the event that two supervisors, including at least one who has received special training in detecting drug intoxication, have a "reasonable suspicion" that an employee is under the influence or is impaired by alcohol or drugs, based upon specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee (49 C.F.R. 219.301(c)(2));[6] in the event of a reportable accident or incident, where a supervisor has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident (49 C.F.R. 219.301(b)(2)); or in the event of certain specific rule violations, including non-compliance with a signal, excessive speeding, improper switch alignment, failure to stop short of a derail, and failure to secure a hand brake (49 C.F.R. 219.301(b)(3)). The regulations establish procedures and safeguards for conducting breath and urine tests, including a provision that assures that whenever the results of the tests are intended for use in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility (49 C.F.R. 219.303, 219.305). Finally, where the employee has declined the opportunity to provide a blood sample, the regulations permit railroads to presume impairment from the presence of an identified controlled substance in the urine (in the absence of persuasive evidence to the contrary), but they require the railroads to provide detailed notice to employees of that presumption and to advise employees of their right to provide a contemporaneous blood sample (49 C.F.R. 219.309).

[5] As defined by 49 C.F.R. 219.5(e), "covered service" generally refers to all service for a railroad that is subject to the Hours of Service Act, 45 U.S.C. 61-64b, and essentially includes all "train and engine crews, yard crews (including switchmen), hostlers, train order and block operators, dispatchers, and signalmen" (50 Fed. Reg. 31530 (1985)).

[6] In order to administer a breath test, the determination of only one supervisory employee is required. 49 C.F.R. 219.301(b)(1).

2. Respondents, the Railway Labor Executives' Association and various of its member labor organizations, brought this action seeking to enjoin the FRA regulations on a variety of statutory and constitutional grounds. In an opinion issued from the bench (App., *infra*, 50a-56a), the district court granted summary judgment in petitioners' favor. The court explained (*id.* at 52a-53a) that under the Fourth Amendment railroad personnel "have a valid interest in the integrity of their own bodies," but that there is also a competing "public and governmental interest in the * * * promotion of * * * railway safety, safety for employees, and safety for the general public that is involved with the transportation." In striking the appropriate balance, the court emphasized (*id.* at 53a) "that the railroad industry is one of the most extensively regulated

industries that we have in interstate commerce; and that the regulation[s] extend[] not just to the railroads themselves, but a certain amount of regulation of the employees." Applying the criteria for assessing the reasonableness of a search within a "pervasively regulated" industry (*ibid.*), the court noted (*id.* at 53a-55a) that the FRA regulations served "a valid governmental and public interest"; that there were "objective event[s] which trigger[] the testing" which were "as well defined as a set of regulations could give"; and that the regulations made a "genuine attempt * * * to limit the scope of the testing requirements to the needs and the events as they have occurred." The court accordingly held that the Fourth Amendment balance "is being struck in favor of the regulatory scheme" (*id.* at 53a).[7]

3. A divided court of appeals reversed (App., *infra*, 1a-49a). The court held, first (*id.* at 8a-13a), that drug and alcohol tests are searches within the meaning of the Fourth Amendment, and that Subpart D of the regulations involves sufficient governmental action to implicate the Fourth Amendment, even though that subpart only authorizes, but does not require, the adoption of testing procedures by otherwise private railroads. The court therefore turned to whether the regulations were constitutionally reasonable. It "agree[d] that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant" (*id.* at 16a). It also acknowledged (*id.* at 24a) that "accommodation of railroad employees' privacy interest with the significant safety concerns of the govern-

[7] The district court rejected (App., *infra*, 51a-52a) as meritless respondents' other constitutional and statutory challenges to the regulations.

ment does not require adherence to a probable cause standard." The court held, however (*id.* at 25a), that "particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception" and, because the regulations were wanting in that respect, the court struck them down.[8]

Elaborating on its understanding of the "particularized suspicion" standard, the court of appeals emphasized (App., *infra*, 25a-26a) that "[a]ccidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." The court also surmised (*id.* at 26a) that it would "pose[] no insuperable burden on the government to require individualized suspicion," noting (*ibid.*) that such a standard was already codified in certain Subpart D provisions (see 49 C.F.R. 219.301(b)(1) and (c)(2)), and reasoning (App., *infra*, at 26a-27a) that the same standard "should be incorporated into the mandatory testing provisions set out in 49 C.F.R. § 219.201 and the other authorized testing provisions set out in 49 C.F.R. § 219.301(b)(2) and (3)." In addition, the court explained (*id.* at 28a) that in the absence of a requirement of

[8] In insisting on a requirement of particularized suspicion, the court of appeals rejected (App., *infra*, 16a-17a) the district court's finding "that th[e] regulations should be evaluated under the standards applicable to administrative inspections of pervasively regulated industries." The court explained (*id.* at 18a) that "[a]ll of the decisions in this line of cases have upheld warrantless searches of property, not of persons," and it "decline[d] to make such an extension in this case." It also stated (*id.* at 19a) that "[a]lthough some railroad safety regulations are directed at employees, * * * the vast bulk of safety legislation is directed at owners and managers of railroads, not their employees."

particularized suspicion, it would be troubled by a further "flaw in the reasonableness of this approach to the problem"—the inability of the drug tests to "measure current drug intoxication or degree of impairment," rather than merely "the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug" (*ibid.*). Reversing the judgment of the district court, the court of appeals held that "intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment" (*id.* at 36a).[9]

In striking down the FRA regulations for want of a "particularized suspicion" requirement, the court of appeals recognized (App., *infra,* 30a) that its decision "may be seen as conflicting with decisions of other circuits." Indeed, the court expressly rejected the Fifth Circuit's decision in *National Treasury Employees Union* v. *von Raab,* 816 F.2d 170 (1987)—in which this Court recently granted certiorari (No. 86-1879 (Feb. 29, 1988))—on the ground that the Fifth Circuit had focused on factors that the court of appeals did not find "relevant" and had failed to "consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception" (App., *infra,* 31a). The court likewise dismissed (*ibid.*) as not "particularly persuasive" the

[9] The court agreed, however (App., *infra,* 29a), that "[t]he manner of conducting the tests is generally reasonable in that they are performed in medical facilities. 49 C.F.R. § 219.203(c)." And the court acknowledged (*ibid.*) that "[t]he intrusiveness of the process of urine testing has been reduced as much as is practicable in that only personnel of the medical facility may supervise the sample collection. 49 C.F.R. § 219.305(a)."

Seventh Circuit's decision in *Division 241 Amalgamated Transit Union* v. *Suscy,* 538 F.2d 1264, cert. denied, 429 U.S. 1029 (1976), even though, as the court acknowledged (App., *infra,* 31a), "the case, because it involves bus drivers, is factually similar."[10] The court of appeals also found (*ibid.*) the decision of the Eighth Circuit in *McDonell* v. *Hunter,* 809 F.2d 1302 (1987), unhelpful, explaining that the court in that case had applied the wrong legal standard and that it had erroneously assumed that urinalysis is less intrusive than body cavity searches. And the court distinguished (App., *infra,* 31a) the decision of the Third Circuit in *Shoemaker* v. *Handel,* 795 F.2d 1136 (1986), cert. denied, No. 86-576 (Dec. 1, 1986), because that case had "adopted the pervasively regulated industry rationale to uphold testing of jockeys," and the court of appeals "d[id] not consider that rationale applicable to the employees in [this] case."[11]

Judge Alarcon dissented (App., *infra,* 37a-49a). In his view, "the activities of railway *personnel* are closely regulated to promote safety," and he would therefore have "adopt[ed] the well-reasoned opinion [of the Third Circuit] in *Shoemaker*" and would have held "that the closely regulated industry exception to the requirement of a warrant and probable cause applies to blood, breath, and urine tests of railway employees under the specific circumstances prescribed in the regulations challenged in this

[10] The court of appeals stated (App., *infra,* 32a) that the *Suscy* decision lacked a "very thorough analysis" and that it did not apply the proper test of reasonableness.

[11] The court of appeals rejected respondents' other challenges to the FRA regulations predicated on statutory grounds (App., *infra,* 32a-34a), the right to privacy (*id.* at 34a-35a), and the equal protection component of the Due Process Clause (*id.* at 35a-36a).

action" (*id.* at 39a (emphasis in original)).[12] Moreover, Judge Alarcon would have found the FRA regulations constitutionally acceptable, even apart from the regulated nature of the industry. Noting that the court's holding was in conflict with decisions in several other circuits (*id.* at 42a), Judge Alarcon criticized the majority for "fail[ing] to engage in [a] balancing of interests" and for focusing instead "solely on the degree of impairment of the workers' privacy interests" (*id.* at 46a). A proper balance, the dissent observed (*ibid.*), would have recognized "that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests."[13]

---

[12] Judge Alarcon reasoned (App., *infra*, 40a) that the "three-pronged test" articulated in *New York* v. *Burger*, No. 86-80 (June 19, 1987), was satisfied by the FRA regulations: "[t]he government has a 'substantial' interest in requiring that tests be conducted to assure that railroad employees avoid drug or alcohol use which might affect their ability to perform their jobs safely" (App., *infra*, 40a); "warrantless inspections are 'necessary to further [the] regulatory scheme' " (*id.* at 41a (citations omitted)); and "the testing procedures set out in the regulatory scheme ' "provid[e] . . . constitutionally adequate substitute[s] for a warrant" ' " (*ibid.* (citations omitted)). Judge Alarcon also stated (*ibid.*) that the " ' "time, place, and scope" ' " of the inspections are "brought within reasonable bounds" by the regulations: the tests must take place " 'as soon as possible' after the occurrence of an event specified in section 219.201" (*ibid.*); the tests "must be conducted by qualified independent medical personnel at independent medical facilities" (*id.* at 42a); and the "regulations * * * limit the scope of testing to determining whether drugs or alcohol are present in the subject's blood or urine" (*ibid.*).

[13] Judge Alarcon also addressed the majority's qualms about the inability of drug tests to discern present impairment. He noted that the FRA regulations require railroads to advise employees about the limitations of the urine tests and to counsel them to take a contemporaneous blood test if they have ingested drugs anytime within the previous sixty days (*id.* at 47a, citing 49 C.F.R. 219.309). That warning, Judge Alarcon observed (App., *infra*, 48a), "protects employees from any mistake that might result from the 'sensitivity' of the urine testing procedure."

At petitioners' request, the Ninth Circuit has stayed its mandate pending the disposition of this petition.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case struck down a carefully considered regulatory scheme designed "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" (49 C.F.R. 219.1(a)). The FRA, acting pursuant to its delegated authority under the Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III) 421 *et seq.*, conducted a two-year rulemaking effort, entertained extensive comments from industry, labor, and the general public, and promulgated a detailed set of regulations addressing what it found to be a "deep and widespread" problem that "require[d] some kind of new initiative" (50 Fed. Reg. 31514 (1985)). The court of appeals found this effort wanting, however, solely because the FRA regulations do not in every case require a showing of "particularized suspicion" prior to testing. For three reasons, that decision warrants further review by this Court.

First, as the court of appeals acknowledged (App., *infra*, 30a), the decision in this case conflicts sharply with decisions in other circuits. Indeed, this Court recently granted certiorari in one such case, *National Treasury Employees Union* v. *von Raab*, No. 86-1879 (Feb. 29, 1988), following a supplemental filing in which petitioners there urged, and we agreed (see Letter from Solicitor General Fried to Joseph F. Spaniol, Jr. (Feb. 25, 1988)),

that a conflict with the Ninth Circuit's decision in the present case justified further review.[14]

Second, although this case and the *von Raab* case present the same ultimate legal question – whether the Fourth Amendment requires a showing of particularized suspicion before the government may engage in employee alcohol and drug testing – this case has several important features that are not presented by *von Raab*. The nature of the governmental interest in the two cases is quite different. Unlike the testing program for Customs employees in *von Raab* – the principal purpose of which is to safeguard the integrity of Customs operations – the tests involved in the present case are principally intended to protect the public safety. In addition, the two cases involve very different types of testing programs. Whereas the tests in *von Raab* were given to all applicants for certain job classifications, the testing in this case applies only to particular individuals involved in certain serious accidents or safety violations. Indeed, the issues presented by this case neatly complement those presented by *von Raab*. By granting review in both cases, the Court will be able to consider the requirements of the Fourth Amendment against a wider and more representative backdrop of competing interests, and therefore provide better guidance to the lower courts and the government in this important and sensitive area.

Finally, the Ninth Circuit's decision is wrong. This Court's cases make clear that a showing of "particularized need" is not an irreducible minimum of reasonableness under the Fourth Amendment. More generally, the court of appeals overstated the nature of employees' privacy in-

[14] We have furnished respondents with copies of petitioners' supplemental brief in the *von Raab* case and the Solicitor General's February 25 letter to Mr. Spaniol.

terests, and understated the competing public interests served by a program that promotes the sober operation of the nation's railroads.

1. The court of appeals held (App., *infra*, 24a) that "[f]inding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought." In so holding, the court was "mindful that [its] decision may be seen as conflicting with decisions of other circuits" (*id.* at 30a). In that limited respect, the court was clearly correct.

For example, in its decision in *von Raab*, the Fifth Circuit expressly rejected the claim that the Fourth Amendment requires individualized suspicion before the Customs Service may administer drug tests to employees who wish to transfer to certain sensitive positions within the Service. The court of appeals observed (816 F.2d at 176, quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976)) that "[w]hile 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.' " Balancing the competing interests, the Fifth Circuit upheld the Customs drug testing program as reasonable under the Fourth Amendment, even though, like the FRA regulations, it did not impose a requirement of individualized suspicion.[15]

The Eighth Circuit reached the identical conclusion in *McDonell* v. *Hunter*, 809 F.2d 1302 (1987), a case involving drug testing of employees at correctional institutions.

[15] The Ninth Circuit rejected the analysis in *von Raab*, stating that the Fifth Circuit had relied on factors that were not "relevant" and that it had failed to "consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception" (App., *infra*, 31a).

Finding the interest in prison security to be "central" and urinalysis "not nearly so intrusive as body searches," the court of appeals held that the drug tests may be performed—without individualized suspicion—either "uniformly or by systematic random selection" (809 F.2d at 1308).[16]

The Third Circuit has also held that drug tests may be administered without individualized suspicion. In *Shoemaker* v. *Handel*, 795 F.2d 1136 (1986), cert. denied, No. 86-576 (Dec. 1, 1986), the court upheld regulations promulgated by the New Jersey Racing Commission that permit drug and alcohol testing for racing officials, jockeys, trainers, and grooms. The court held (795 F.2d at 1141-1143) that the horse-racing industry in general, and jockeys in particular, have been made subject to pervasive regulation. The court accordingly rejected the jockeys' claim (*id.* at 1141) that daily breathalyzer tests and random urine tests may be required only where there is individualized suspicion of drug or alcohol abuse.[17]

The recent decision of the District of Columbia Circuit in *Jones* v. *McKenzie*, 833 F.2d 335 (1987), is also in conflict with the decision below. There, the court of appeals held that the District of Columbia could constitutionally administer drug tests to bus attendants who were responsible for supervising, attending and carrying handicapped children. The court agreed that there were "strong privacy interests" involved (833 F.2d at 339), but concluded that

[16] The court of appeals in the present case stated (App., *infra*, 31a) that the Eighth Circuit in *McDonell* applied the wrong legal standard and that it erred in characterizing urinalysis as less intrusive than a body cavity search.

[17] The Ninth Circuit disagreed, in part because it "decline[d]" to "exten[d]" the "administrative inspection exception" to searches of persons, as opposed to searches of property (App., *infra*, 18a).

those were outweighed by the "*serious* safety concerns on the other side of the balance" (*id.* at 340 (emphasis in original)). It therefore reversed the decision of the district court, which had held that the District could not conduct drug testing in the absence of "particularized probable cause" (*id.* at 338).[18]

Finally, in *Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264, cert. denied, 429 U.S. 1029 (1976)—a case which the Ninth Circuit recognized as "factually similar" to the present case (App., *infra*, 31a)—the Seventh Circuit approved a drug and alcohol testing program for bus drivers who were involved in serious accidents. There, as here, the tests did not require individualized suspicion of drug or alcohol abuse. The court of appeals nevertheless upheld the program as reasonable under the Fourth Amendment.[19]

2. Further review in this case is also warranted in order to provide effective guidance to lower courts and the government in an area of the utmost public importance. Although the Court has recently granted certiorari in the Fifth Circuit's *von Raab* decision (No. 86-1879 (Feb. 29, 1988)), the present case offers a very different perspective on drug and alcohol testing. Unlike the drug tests in *von Raab*, which are primarily justified by a concern for

[18] Like the Ninth Circuit, however (see App., *infra*, 28a-29a), the D.C. Circuit observed that the urinalysis technology involved in that case was unable to test for present drug impairment. For that reason, the D.C. Circuit concluded "that the School System could not constitutionally test its employees for drugs *in the manner Jones was tested*" (833 F.2d at 339 (emphasis in original)).

[19] The Ninth Circuit found the *Suscy* case not to be "particularly persuasive," in that the Seventh Circuit proceeded "without very thorough analysis" and failed to apply the appropriate legal standard (App., *infra*, 31a-32a).

employee and operational integrity, the testing of railroad employees is based on the need to secure the safe performance of an important public service. And whereas the tests in *von Raab* are administered uniformly to all employees who apply for certain covered positions, the tests in this case are targeted to employees who have been directly involved in significant accidents, incidents, or rule violations.

These and other distinctions will entail fundamental differences in the balancing process required to determine whether the programs are "reasonable" within the meaning of the Fourth Amendment. This Court has made it clear that in determining reasonableness, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979). In some respects, the tests in *von Raab* may be more intrusive (because they apply to all employees who apply for certain positions); in other respects they may be less intrusive (because they are only administered when an employee seeks a covered position). In some respects, the government's justifications for performing the tests in this case may be more compelling (because of demonstrated safety problems); in other respects they may be less compelling (because of the difficulty of demonstrating current impairment through urinalysis testing).[20] Indeed, because of these and other

[20] We note, however, that the court of appeals erred in concluding (App., *infra*, 28a) that urine tests, when supplemented by blood tests, are not "reasonably related" to the purposes of drug testing, on the grounds that, standing alone, those tests cannot measure current drug impairment. Even granting the latter premise—which, in any event, is not always true—the FRA does not act "unreasonably" in gathering blood and urine samples simply because it must examine those samples along with other relevant data in making the ultimate determination of current impairment. What is more, detection of current impairment is not the only function of the FRA drug and alcohol testing program. The program is also designed to deter the use of illicit drugs (50 Fed. Reg. 31541 (1985)), to identify persons with chemical dependencies who require treatment (49 Fed. Reg. 24294-24295 (1984)), and to determine with greater precision the causes of major accidents in order to target enforcement and regulatory efforts (50 Fed. Reg. 31541 (1985)).

differences, and because of the approach taken by the court of appeals below, there is no reason to expect that the Ninth Circuit would reach a different result on remand, regardless of how this Court decides *von Raab*. In our judgment, therefore, the Court should grant plenary review in both cases, rather than hold the present case pending the disposition of *von Raab*.

In addition, by granting review in the instant case, along with *von Raab*, the Court will be able to consider a wider range of issues than will be presented if it considers *von Raab* alone. For example, several courts, including the Ninth Circuit in the decision below (App., *infra*, 28a-29a), have expressed concern that current state-of-the-art urinalysis tests cannot distinguish between persons who are intoxicated or impaired and persons who have used illicit drugs in the recent past but who may not be currently impaired. See also *Jones* v. *McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987); *National Fed'n of Fed. Employees* v. *Carlucci*, No. 86-0681 (D.D.C. Mar. 1, 1988). This concern has been advanced primarily in cases in which the government's interest is in protecting public safety, on the theory—the validity of which we do not concede—that the only relevant consideration in such a case is whether employees are currently impaired. Such a concern, however, is of little or no relevance in a case like *von Raab*, where the primary governmental interest relates to the

danger that those who *use* illicit drugs, whether or not they are impaired on the job, may be susceptible to corruption or blackmail.

Moreover, there are at present a growing number of cases in the lower federal courts and state courts in which safety concerns—rather than the interest in public integrity—have been advanced as the primary basis for drug or alcohol testing. The courts have reached disparate results in those cases. Compare, *e.g.*, *National Fed'n of Fed. Employees* v. *Carlucci, supra* (safety interests do not justify random urinalysis of civilian employees in Department of Defense, in such positions as air traffic controller, pilot, and aircraft mechanic), with *Burka* v. *New York City Transit Auth.*, No. 85 Civ. 5751 (S.D.N.Y. Feb. 1, 1988), slip op. 38-39 (approving safety reasons as legitimate basis for drug testing of mass transit workers). Review in the present case would therefore offer important direction to lower courts and the government about the distinct Fourth Amendment issues presented by drug testing programs designed to protect public safety.

3. Finally, review is warranted in this case because the decision of the court of appeals is wrong. The court erred when it took as its premise (App., *infra*, 24a) the proposition that "[f]inding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought." As Judge Alarcon observed in dissent (*id.* at 46a), the court of appeals accepted that premise only because it "focuse[d] solely on the degree of impairment of the workers' privacy interests" and never "engage[d] in the balancing of interests required by the Court." The court also erred by failing to consider the regulated nature of railroad work when it assessed the strength of the employees' expectation of privacy. That error puts the

court squarely at odds with the decision of the Third Circuit in the *Shoemaker* case (795 F.2d 1136 (1986)), and, as the dissenting judge noted (App., *infra*, 38a-39a), hinges on a mistaken impression of the extent to which railroad employees are in fact subject to government regulation.[21]

What is more, the court of appeals never came to grips with the most basic feature of the testing program in this case: that it is triggered only by a significant train accident, incident, or rule violation. The court ignored that element of the program entirely, simply because, in its view, an employee's direct involvement in such an event does not amount, without more, to particularized suspicion of alcohol or drug use (App., *infra*, 25a-26a). But in so doing, the court overlooked the fact that the regulations are designed to assist the FRA and railroads in ascertaining the causes of serious accidents, incidents, and rule violations. That is an important public and governmental interest, and it provides a compelling justification for the decision to administer the tests in the first place. Thus, while the narrowly targeted nature of the testing may not, standing alone, satisfy a "particularized suspicion" standard, it surely bears in an important way on the overall reasonableness of the regulations.[22]

---

[21] For example, the court of appeals stated that "[t]he Secretary of Transportation is expressly precluded from setting standards for qualifications of railroad employees" (App., *infra*, 21a); but the very statute on which the court relied in drawing that conclusion (45 U.S.C. 431(a)) expressly authorizes the Secretary to issue such rules and regulations "as are specifically related to safety."

[22] The court's determination (App., *infra*, at 10a-13a) that the Subpart D regulations implicate the Fourth Amendment—even though they merely authorize, but do not require, testing by private railroads—is likewise doubtful at best. The "exercise of the choice allowed by * * * law[,] where the initiative comes from [a private party] and not from the State, does not make its action in doing so 'state action' * * *." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S.

The court of appeals' decision has effectively nullified a carefully considered effort to detect and deter drug and alcohol impairment in the operation of the nation's rails. The decision is flawed at every turn, and it is in stark conflict with decisions in other circuits. And because of the special features of the testing programs at issue, we believe that a grant of plenary review in this case, in conjunction with *von Raab,* would provide this Court with a more representative overview of the range of issues involved in drug and alcohol testing, and would afford important guidance to the lower courts and the government in an area of mounting public concern.

345, 357 (1974). See also *Flagg Bros.* v. *Brooks,* 436 U.S. 149, 160 n.10, 164-166 (1978); *Rendell-Baker* v. *Kohn,* 457 U.S. 830, 841-842 (1982); *Blum* v. *Yaretsky,* 457 U.S. 991, 1004 (1982). Rather, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State" (457 U.S. at 1004). The court of appeals adduced no such "coercive power" or "significant encouragement" in its analysis of the Subpart D regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.[23]

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHAITMAN
MARC RICHMAN
Attorneys

B. WAYNE VANCE
General Counsel
Department of Transportation

S. MARK LINDSEY
Chief Counsel

GREGORY B. MCBRIDE
Assistant Chief Counsel

DANIEL CAREY SMITH
Deputy Assistant Chief Counsel
Federal Railroad Administration

MARCH 1988

---

[23] If the petition is granted, the Court may wish to direct that the case be set for argument in tandem with *National Treasury Employees Union* v. *von Raab,* No. 86-1879.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2891
D.C. No. CV85-7958CAL

RAILWAY LABOR EXECUTIVES' ASSOCIATION; UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT, THE SOUTHERN PACIFIC COMPANY; BROTHERHOOD OF LOCOMOTIVE ENGINEERS GENERAL COMMITTEE OF ADJUSTMENT, THE SOUTHERN PACIFIC COMPANY; AND BROTHERHOOD OF RAILROAD SIGNALMEN,
PLAINTIFFS-APPELLANTS

vs.

JAMES H. BURNLEY*, SECRETARY, DEPARTMENT OF TRANSPORTATION; JOHN R. RILEY, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION,
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES A. LEGGE, District Judge, Presiding

Argued and Submitted
July 8, 1986—Seattle, Washington

[Filed: FEB. 11, 1988]

---

* James H. Burnley is substituted for defendant Elizabeth Dole pursuant to Fed. R. App. P. 43(c)(1).

OPINION

Before: TANG, PREGERSON and ALARCON, Circuit Judges.

TANG, Circuit Judge:

The Railway Labor Executives' Association[1] and various railway labor organizations which are constituent members (collectively "RLEA") appeal the district court's grant of summary judgment for the government. RLEA challenges the constitutionality of Federal Railroad Administration (FRA) regulations mandating blood and urine tests of employees after certain train accidents and fatal incidents, and authorizing breath and urine tests after certain accidents, incidents and rule violations. RLEA also argues that the regulations violate provision of the Railway Labor Act, the Federal Rehabilitation Act and the Federal Railroad Safety Act. We reverse.

BACKGROUND

The regulations at issue are codified in 49 C.F.R. Part 219 (1986). They were issued by the FRA after a two-year rulemaking process on August 2, 1985 and scheduled to become effective November 1, 1985. RLEA was a party to the administrative proceedings and filed a petition for reconsideration which the Secretary denied on October 28, 1985. It then filed suit in federal district court on October 31, 1985, and received a temporary restraining order prohibiting implementation of the regulations. The TRO remained in effect until the district court granted summary

[1] The RLEA is an unincorporated association representing all crafts of railroad workers in the country.

judgment for the government on December 9, 1985. RLEA sought and obtained a stay pending appeal from this Court on January 3, 1986 but the Supreme Court vacated the stay on January 27, 1986. *Dole v. RLEA*, 106 S. Ct. 876 (1986). The regulations thus went into effect February 10, 1986 with mandatory post-accident testing beginning March 10.

The portions of the new regulation which are the subject of this challenge are Subpart C, which requires post-accident testing, and Subpart D, which authorizes testing for "cause." The key provisions are summarized below, and set out in full in the margin.

The provisions of Subpart C mandate alcohol and drug testing for all covered employees involved in various events, including: major train accidents (involving a fatality, release of hazardous material with either evacuation or injury, or $500,000 damage to railroad property); impact accidents (involving a reportable injury[2] or damage to railroad property of $50,000); and fatal incidents (involving fatality of an on-duty railroad employee). 49 C.F.R. § 219.201.[3] The regulations require that blood and urine

[2] A reportable injury is one which must be reported under Part 225. 49 C.F.R. § 219.5(s). According to 49 C.F.R. § 225.19(d)(4), a reportable injury is one that requires medical treatment or results in restriction of work or motion for one or more work days, one or more lost work days, termination of employment, transfer to another job or loss of consciousness.

[3] **§ 219.201 Events for which testing is required.**

(a) *List of events.* On and after March 10, 1986, except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraph (a) (1) through (3) of this section:

(1) *Major train accident.* Any train accident that involves one or more of the following:

(i) A fatality;

samples be taken from all crew members of a train involved in such an accident or incident as soon as possible afterwards. Blood samples are to be taken at independent medical facilities by qualified medical professionals or technicians. 49 C.F.R. § 219.203.[4] Refusal to provide a sample results in a 9 month period of disqualification. 49 C.F.R. § 219.213.[5]

(ii) Release of a hazardous material accompanied by –

(A) An evacuation; or

(B) A reportable injury resulting from the hazardous material release (*e.g.*, from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of $500,000 or more.

(2) *Impact accident.* An impact accident resulting in –

(i) A reportable injury; or

(ii) Damage to railroad property of $50,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

[4] **§ 219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* (1) Following each accident and incident described in § 219.201, the railroad (or railroads) shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological testing by FRA.

(b) *Timely sample collection.* (1) The railroad shall make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident.

(c) *Place of sample collection.* (1) Employees shall be transported to an independent medical facility where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

[5] **§ 219.213 Unlawful refusals; consequences.**

(a) *Disqualification.* (1) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months.

The provisions of Subpart D authorize railroads to require covered employees to submit to breath or urine tests when a supervisor has a reasonable suspicion that an employee is under the influence or impaired by alcohol or drugs. To require a urine test, two supervisors must have reasonable suspicion, and if drug use is suspected, one of them must have been trained in spotting drug use. 49 C.F.R. § 219.301(b)(1),[6] (c)(2)[7]. The railroads may also

---

[6] **§ 219.301 Testing for reasonable cause.**

(b) *Reasonable cause for breath tests.* The following circumstances constitute reasonable cause for the administration of breath tests under this section:

(1) *Reasonable suspicion.* A supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol, or alcohol in combination with a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee.

[7] (c) *Reasonable cause for urine test –*

* * *

(2) *Reasonable suspicion.* Reasonable cause also exists where a supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee, subject to the following limitations:

(i) An employee may be required to submit to urine testing for reasonable suspicion only if the determination is made by at least two supervisory employees; and

(ii) If the determination to require urine testing is based upon suspicion that the employee is under the influence of or impaired by a controlled substance, at least one supervisory employee responsible for the decision to require urine testing must have received at least three (3) hours of training in the signs of drug intoxication consistent with a program of instruction on file with FRA under Part 217 of this title. Such program shall, at a minimum, provide information concerning the acute behaviorial and apparent physiological effects of the major

require testing when an employee is involved in an accident or incident which must be reported under Part 225 and a supervisor has reasonable suspicion that his acts or omissions contributed to the accident. 49 C.F.R. § 219.301(b)(2).[8] The railroads may also require testing when an employee violates a railroad operating rule listed in 49 C.F.R. § 219.301(b)(3).[9]

---

drug groups on the controlled substances list (narcotics, depressants, stimulants, hallucinogens, and marijuana).

[8] § **219.301 Testing for reasonable cause**
(b) *Reasonable cause for breath tests.*
(1) *Reasonable suspicion* (see note 5)

• • •

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under Part 225 of this title, and a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

[9] (3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors:
(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other director [*sic*] with respect to movement of a train that involves–
(A) Occupancy of a block or other segment of track to which entry was not authorized;
(B) Failure to clear a track to permit opposing or following movement to pass;
(C) Moving across a railroad crossing at grade without authorization; or
(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);
(ii) Failure to protect a train as required by a rule consist with § 218.37 of this title;
(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;
(iv) Alignment of a switch in violation of a railroad rule or operation of a switch under a train;

There are no factual disputes in this case except as to the extent of alcohol and drug abuse in the railroad industry and the number of accidents involving either. The record shows that, between 1975 and 1984, of 791 fatalities caused by railroad employees, 37 resulted from accidents or incidents involving alcohol or drug use, or 4.7 percent. The FRA contends the problem is more serious than the 4.7 percent figure would indicate because of underreporting by the railroad industry of alcohol and drug involvement, because of the increased dangers involved in railroad transport of hazardous materials, and because drug and alcohol use has grown more pervasive in recent years.

The district court assumed the seriousness of the problem, and the RLEA concedes that alcohol and drug use are serious hazards to railroad safety. Thus, although there is some difference of opinion about just how pervasive the problem is, the central dispute in this case is not a factual one. Rather, the case involves disputes as to the statutory authority for the rule and its constitutionality.

ANALYSIS

We review a grant of summary judgment de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district

---

(v) Failure to apply or stop short of derail as required;
(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes; or
(vii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

court correctly applied the relevant substantive law. *Ashton v. Cory,* 780 F.2d 816, 818 (9th Cir. 1986). We review questions of law de novo. *United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984).

I. FOURTH AMENDMENT

To decide whether the drug tests mandated or authorized by the regulations violate the fourth amendment, we must first determine whether the amendment's prohibition of unreasonable searches and seizures applies to drug tests conducted at the instigation of the railroads pursuant to regulations adopted by the FRA. We hold that it does, both because the tests in question constitute searches within the meaning of the fourth amendment and because the federal government's role in promulgating the regulations in question is sufficient government action to subject the tests to the limitations of the fourth amendment.

A. *Drug and Alcohol Tests are Searches*

The fourth amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." These rights are implicated only if the conduct at issue infringes " 'an expectation of privacy that society is prepared to consider reasonable.' " *O'Connor v. Ortega,* 107 S.Ct. 1492, 1497 (1987) (plurality opinion) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The question we must first consider is whether a railroad employee has a reasonable expectation of privacy in the personal information contained in his body fluids.

It has long been clearly settled that blood tests such as those mandated by 49 C.F.R. § 219.203 are searches within the meaning of the fourth amendment. *Schmerber*

v. California, 384 U.S. 757, 767 (1966).

Every court that has considered the matter has similarly concluded that urine tests, such as those mandated by 49 C.F.R. § 219.203 and authorized by 49 C.F.R. § 219.301, are searches for fourth amendment purposes. *See, e.g., Everett v. Napper,* 833 F.2d 1507, 1509 (11th Cir. 1987); *Jones v. McKenzie,* 833 F.2d 335, 338 (D.C. Cir. 1987), *National Fed'n of Fed. Employees v. Weinberger,* 818 F.2d 935, 942 (D.C. Cir. 1987); *National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 176 (5th Cir. 1987); *McDonell v. Hunter,* 809 F.2d 1302, 1307 (8th Cir. 1987); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266-67 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency,* 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); *Feliciano v. City of Cleveland,* 661 F. Supp. 578, 586 (N.D. Ohio 1987); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Capua v. City of Plainfield,* 643 F. Supp. 1057, 1513 (D.N.J. 1986); *Allen v. City of Marietta,* 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); *Storms v. Coughlin,* 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984); *Smith v. City of East Point,* 183 Ga. App. 659, 359 S.E.2d 692 (1987). The usual rationale is that urine testing is similar to blood testing because even though urine is routinely discharged from the body it is "normally discharged and disposed of under circumstances that merit protection from arbitrary interference." *Capua*, 643 F. Supp. at 1513. Because people have reasonable expectations of privacy in the personal information body fluids contain, the governmental taking of a urine specimen constitutes a search and seizure within the meaning of the fourth amendment. *Id.*

It has also been held, with less discussion of the rationale, that breath tests are searches within the mean-

ing of the fourth amendment. *See, e.g., Burnett v. Municipality of Anchorage,* 806 F.2d 1447, 1449 (9th Cir. 1986); *Shoemaker v. Handel,* 795 F.2d 1136, 1141 (3d Cir.) (applying fourth amendment administrative search exception to urine and breath testing without explicitly deciding the testing constitutes a search), *cert. denied,* 107 S. Ct. 577 (1986).

B. ***Government Action Requirement***

The second question we must consider is whether the federal government's role in promulgating this regulatory scheme is sufficient to subject the tests carried out in accordance with these provisions to the limitations of the fourth amendment. FRA argues that Subpart D merely authorizes private railroads to carry out tests under certain circumstances and that there is no government action involved.

The district court rejected this argument, and FRA did not cross-appeal after prevailing in the district court. FRA may nevertheless raise the argument on appeal because it does not seek to expand the relief granted by that court. *United States v. New York Telegraph Co.*, 434 U.S. 159, 166 n.8 (1977). It is well settled that a prevailing party, "though he files no cross-appeal or cross-petition, may offer in support of his judgment any argument that is supported by the record, whether it was ignored by the court below or flatly rejected." 9 Moore's Federal Practice ¶ 204.11[3] (2d ed. 1985) (footnote omitted).

On the merits, the district court was correct in finding government action in the authorized testing provisions relying on the authority of *United States v. Davis,* 482 F.2d 893, 896-904 (9th Cir. 1973). In *Davis* we considered the applicability of the fourth amendment to airport security searches conducted by private airline employees.

We began our inquiry with the observation that the fourth amendment applies to a search whenever the government participates in any significant way in a total course of conduct leading to a search. *Id.* at 897. We pointed out that the determining factor " 'is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means.' " *Id.* (quoting *Lustig v. United States*, 338 U.S. 74, 79 (1949)). After reviewing the history of concern with hijacking and the development of a nationwide anti-hijacking program conceived, directed, and implemented by federal officials in cooperation with air carriers, we concluded that the government's role in the airport search program had been a dominant one. *Davis*, 482 F.2d at 897-904. We said that even if it could be characterized accurately as mere encouragement or, in the language of *United States v. Guest,* 383 U.S. 745, 755-56 (1966), as "peripheral, or . . . one of several cooperative forces leading to the [alleged] constitutional violation," it was still significant for fourth amendment purposes. *Davis*, 482 F.2d at 904. We expressly noted that it made no difference that the search was conducted by a private airline employee because the search was part of the overall, nationwide anti-hijacking effort and thus constituted "state action" for fourth amendment purposes. *Id.* It also made no difference that the search was conducted prior to the issuance of formal regulations mandating pre-boarding searches. *Id.* at 902-04.

In this case, the government's involvement in developing the rule and in regulating its implementation clearly amounts to significant involvement for fourth amendment purposes. FRA's regulation was issued under the authority of the Federal Railroad Safety Improvement Act of 1970, 45 U.S.C. §§ 421-444, and the Accident Reports Act of 1910, 45 U.S.C. §§ 38-43. The Safety Act invests the

Secretary of Transportation with authority to regulate "all areas of railroad safety," 45 U.S.C. § 431, and empowers him to conduct investigations, issue subpoenas, require production of documents, and delegate to qualified persons functions concerning the examination, inspecting, and testing of railroad equipment, operations, and persons, 45 U.S.C. § 437. Authority to administer the Act has been delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(m).

The Accident Reports Act provides that railroads must make monthly reports to the Secretary of Transportation of all collisions, derailments or other accidents resulting in death, injury or property damage. The Secretary is authorized to investigate all railroad accidents resulting in serious injury or property damage, and, to that end, is granted certain appropriate powers, including the power to require the production of evidence and, when deemed to be in the public interest, to make reports of such investigations stating the cause of the accident. 45 U.S.C. §§ 38-40. That statute also authorizes the issuance of "such rules . . . as are necessary." 45 U.S.C. § 42. The Secretary's authority under this Act too has been delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(c)(11). The FRA has issued detailed accident reporting regulations, found at 49 C.F.R. Part 225.

FRA safety inspectors conduct investigations across the national rail system on a daily basis to promote compliance with safety regulations. As necessary, the FRA may require cooperation of the railroad company to facilitate the examination of facilities or pertinent records. *See United States v. Missouri Pacific R.R.*, 553 F.2d 1156 (8th Cir. 1977).

FRA developed the regulations at issue here through a process initiated on June 30, 1983 and concluded August 2, 1985. FRA undertook this rulemaking process in

response to a perception that drug and alcohol abuse is a serious problem in the railroad industry posing unacceptable risks to public and employee safety. The general concern with drug and alcohol abuse and the national goal of eradicating that abuse is a matter of common knowledge. For example, the President's Commission on Organized Crime proposed that to reduce the demand for drugs "[t]he President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs." President's Commission on Organized Crime, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime at 483 (1986). In response, the President, on September 15, 1986, issued an Executive Order for a "Drug-Free Federal Workplace." Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). These expressions of national concern are mirrored in FRA's effort to develop a workable program of drug testing for the railroad industry. We cannot view the testing provisions, even those which authorize testing by private railroads, as anything less than part of an overall, nationwide anti-drug campaign. *Cf. Davis,* 482 F.2d at 897. Thus the government's role in the railroad drug testing program has been a dominant one, sufficiently significant for fourth amendment purposes.

C. *Fourth Amendment Standard*

Having found that the fourth amendment applies to drug and alcohol tests conducted pursuant to federal regulatory authority " 'is only to begin the inquiry into the standards governing such searches. . . . [W]hat is reasonable depends on the context within which a search takes place.' " *O'Connor*, 107 S. Ct. at 1499 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)). It is generally

settled that " 'except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.' " *O'Connor*, 107 S. Ct. at 1499 (quoting *Mancusi v. DeForte*, 392 U.S. 364, 370 (1968)).

1. *Warrant Requirement*

It appears clear that this is a case in which a warrant is not required. Although a warrant is generally required to make a search reasonable, it is not the *sine qua non* of reasonableness. For example, a warrantless inspection of commercial enterprises in a closely regulated industry is reasonable within the meaning of the fourth amendment if the inspection meets certain criteria. *New York v. Burger*, 107 S. Ct. 2636 (1987). In another context the Court has held that public employer intrusions on the constitutionally protected privacy interests of government employees for work-related purposes and for investigations of work-related misconduct should be judged by the standard of reasonableness under all circumstances. *O'Connor*, 107 S. Ct. at 1502. The Court has also held that the warrant requirement is unsuited to the school environment because it would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). In general the Court has indicated that the warrant requirement is dispensed with when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). Such an exception is carved out only when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

In the seminal case on body fluid testing, the Court held that compelled blood tests in a drunk driving case are constitutionally permissible without a search warrant. *Schmerber v. California*, 384 U.S. 757 (1966). The Court stated that even though the warrant requirement could be dispensed with, there still had to be probable cause to initiate such a test. It said

> [t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear.

Id. at 769-770. The *Schmerber* Court found the blood test reasonable without a warrant because the same facts which gave probable cause for the arrest also suggested the relevance of the blood test, and because the blood test was a reasonable test with little risk, trauma or pain and was conducted in a reasonable manner. *Id.* at 770-771. RLEA concedes that a warrant is not necessary to legitimate body fluid testing under the regulations but argues that the *Schmerber* requirement for something like probable cause[10] must exist to justify the testing of any particular individual.

---

[10] Recently the Supreme Court has explained that the "clear indication" specified in *Schmerber* was not a third standard between probable cause and reasonable suspicion, but was simply another way of stating that police must have a particularized suspicion that the evidence sought might be found within the body of the individual. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

We can agree that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant. *Schmerber*, 384 U.S. at 770. *Compare T.L.O.*, 496 U.S. at 340 (to require a teacher to obtain a warrant before a search when she suspects an infraction of school rules would unduly interfere with the maintenance of discipline in the schools).

2. *Exceptions to Warrant Requirement*

Although we agree that drug and alcohol testing can be conducted without a warrant, we do not believe the case fits within one of the "carefully defined classes of cases," *Mancusi*, 392 U.S. at 370, previously identified by the Supreme Court as reasonable without a warrant.[11] The most relevant prior exemption which is applicable in the eyes of FRA and the district court, is the administrative search. The district court specifically found that these regulations should be evaluated under the standards applicable to administrative inspections of pervasively

[11] Such well-defined exceptions include: (1) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383 (1914); (2) the "automobile exception," *Carroll v. United States*, 267 U.S. 132 (1925); (3) hot pursuit, *Warden v. Hayden*, 387 U.S. 294 (1967); (4) stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968); (5) plain view, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); (6) border searches, *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); (7) administrative searches of closely regulated industries, *New York v. Burger*, 107 S. Ct. 2636 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); (8) inventory searches, *Illinois v. LaFayette*, 462 U.S. 640 (1983); (9) searches of school-children's possessions at school, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); (10) consent, *United States v. Mendenhall*, 446 U.S. 544 (1980).

regulated industries. *See New York v. Burger*, 107 S. Ct. 2636 (1987) (automobile junkyard); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mines); *United States v. Biswell*, 406 U.S. 307 (1978) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor).

The administrative search doctrine applied to closely regulated industries has undergone significant alterations over the years. In the first such case, the Court approved the reasonableness of warrantless searches and seizures in the liquor industry because of the long history of Congressional regulation of the industry. *Colonnade Catering*, 397 U.S. at 75-77. In *Biswell*, 406 U.S. at 315-16, the Court approved of warrantless searches conducted pursuant to the Gun Control Act not because of a deeply rooted history of federal regulation, but because of the need for flexibility and because the prerequisite of a warrant would frustrate the goals of inspection. The Court found that owners of businesses know they are subject to inspection from the time they choose to engage in a pervasively regulated business, thus there is only a limited threat to expectations of privacy. *Id.* at 316. The Court has further explained, in a case treating inspection of mines, that a congressionally established regulatory scheme and a comprehensive and defined federal regulatory presence lets the owner of commercial property know that his property will be periodically inspected. *Dewey*, 452 U.S. at 603. Such an inspection program, in terms of certainty and regularity of application provides a constitutionally adequate substitute for a warrant. *Id.* In that case, rather than leaving the frequency and purpose of inspections to the unchecked discretion of government officers, the Act established a predictable and guided federal regulatory presence. *Id.* at 604. When no such regulatory plan is built into the legislation regulating a specific industry, the Court has required

a warrant as a condition of a reasonable search. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (OSHA inspections not directed at a specific regulated industry; warrant necessary to demonstrate an inspection conforms to an established administrative plan).

The most recent articulation of this exception to the warrant requirement emphasizes that warrant and probable cause requirements which fulfill the traditional fourth amendment standard of reasonableness have lessened application in the context of a closely regulated industry because the owner or operator of commercial premises in such an industry has a reduced expectation of privacy. *Burger*, 107 S. Ct. at 2643. A warrantless inspection of the commercial premises of a pervasively regulated business will be deemed to be reasonable only if three criteria are met: (1) a "substantial" government interest informs the regulatory scheme; (2) warrantless inspections must be necessary to fulfill the regulatory scheme; and (3) the inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Id.* at 2643-44. As a substitute for a warrant the regulatory statute must perform the two functions of a warrant: it must advise the owner of the premises that the search is made pursuant to law and has a properly defined scope and it must limit the discretion of inspecting officers. *Id.* at 2644.

We do not believe the administrative inspection exception is applicable to the regulatory scheme before us. All of the decisions in this line of cases have upheld warrantless searches of property, not of persons, and we decline to make such an extension in this case. The Court, in reviewing the closely regulated industry cases, has stressed that no reasonable expectation of privacy could exist "for a *proprietor* over the *stock* of such an

enterprise." *Burger*, 107 S. Ct. at 2642 (quoting *Marshall*, 436 U.S. at 313) (emphasis added); *accord United States v. Munoz*, 701 F.2d 1293, 1299 (9th Cir. 1983). *See, also, Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985) (approving inspections of family day care homes in the areas where and when business is being conducted because day care centers fall within the pervasively regulated business exception); *Balelo v. Baldridge*, 724 F.2d 753, 767 (9th Cir.) (en banc) (approving government inspection of fishing vessels for violations of the Marine Mammal Protection Act, but noting that the regulation does not authorize searches of the persons, personal effects, or living quarters of the Captains and their crews, and that such searches would have to be justified independently under the fourth amendment), *cert. denied*, 467 U.S. 1252 (1984); *United States v. Raub*, 637 F.2d 1205 (9th Cir. 1980) (warrantless boarding of vessels approved as authorized by statute and aspect of historical and pervasive regulation of salmon-fishing industry).

There is no question that the railroad industry has experienced a long history of close regulation. *See supra* at 11-12. This regulation has diminished the *owners'* and *managers'* expectations of privacy in railroad premises, but we do not believe it has diminished the individual railroad *employee's* expectation of privacy in his person or his body fluids. Although some railroad safety regulations are directed at employees, such as the hazardous materials transportation laws, 49 U.S.C. §§ 1801-1812, the vast bulk of safety legislation is directed at owners and managers of railroads, not their employees. By this we mean that the inspections and investigations to assure compliance with the regulations are directed at the premises, equipment, rolling stock and books and records of the owners and

managers, not at their employees. 45 U.S.C. § 437(b). Further, the duty to comply with the regulations and the sanctions and penalties for violations of the regulations fall on the owners and managers, not their employees.[12]

We emphasize this point to distinguish the case before us from the Third Circuit's decision in *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986), which held the administrative search exception applies to warrantless breath and urine testing of jockeys in the heavily regulated horse-racing industry. Critical to the *Shoemaker* court's analysis was the fact that jockeys, as the persons engaged in the regulated activity, are the principal regulatory concern. *Id.* The regulation of horse racing in New Jersey is designed to protect the wagering public and its confidence in the integrity of the industry, and to those ends has always been geared to assuring the integrity of racetrack employees through licensing provisions and restrictions on employing persons convicted of a crime involving moral turpitude. *Id.* at 1141-42. In contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities. Railroad employees are not licensed, nor is their employment conditioned upon the

[12] *See, e.g.*, 45 U.S.C. § 438 (penalties for violation of the Federal Railroad Safety Act fall on railroads); 45 U.S.C. § 64a(a)(1) (penalties for violation of the Hours of Service Act fall on railroads); 45 U.S.C. § 13 (penalties for violation of the Safety Appliance Acts fall on railroads); 45 U.S.C. § 34 (penalties for violation of the Locomotive Inspection Act fall on railroads); 45 U.S.C. § 39 (penalties for violation of the Accident Reports Act fall on railroads); 49 U.S.C. § 26 (penalties for violating the Signal Inspection Act fall on railroads).

absence of a prior criminal record. The Secretary of Transportation is expressly precluded from setting standards for qualifications of railroad employees, 45 U.S.C. § 431(a), while the New Jersey Racing Commission has always had the authority to prescribe the conditions under which licenses may be issued or revoked. *Shoemaker*, 795 F.2d at 1141. Railroad safety regulations have not put railroad employees on notice that their participation in the industry reduces their legitimate expectations of privacy in the integrity of their bodies. Certainly there are industry requirements of health and fitness, but these have been matters of private negotiation between railroads and employees not matters of federal regulation. *See, e.g., Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, Nos. 85-4137 and 85-4138.

Thus we conclude that the administrative inspection standard, which allows warrantless searches of the premises of pervasively regulated industries, is not applicable to searches of persons even when they are employed in those industries, unless the employees are the principal concern of the industry regulation.

We note that FRA actually argues for an extension of a broader administrative search doctrine than that developed in the pervasively regulated industry cases. FRA relies principally on *Camara v. Municipal Court*, 387 U.S. 523 (1967), which required a warrant based on administrative probable cause to inspect premises to assure compliance with fire, health and safety codes. The Court held that area code-enforcement inspections of municipal housing are reasonable because: (1) such programs have a long history of judicial and public acceptance; (2) there is no other canvassing technique which would achieve acceptable results; and (3) the inspections are neither personal in nature nor aimed at discovery of crime. *Id.* at 537. We

think the animating principles of this case have little application to the drug testing at issue here. *Camara*, in common with the closely regulated industry cases, only approved inspections of property which are not personal in nature. *Id.*

FRA also argues that the Supreme Court and the Ninth Circuit have frequently approved of searches of persons conducted without probable cause or individual suspicion. It cites *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upheld brief vehicle stops at fixed checkpoints to question occupants without individual suspicion); *United States v. Des Jardins*, 747 F.2d 499, 505-06 (9th Cir. 1984) (upheld pat-down search of person at border based only on minimal showing of suspicion), *partially vacated*, 772 F.2d 578 (9th Cir. 1985); *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978) (approved routine metal detector and pat-down searches of attorneys entering courthouse); *Davis*, 482 F.2d at 910-11 (approved pre-boarding searches of airline passengers).

We do not consider these cases to be in point. Stops for questioning, pat-down searches and magnetometer searches do not approach the degree of intrusiveness involved in toxicological testing of body fluids. The consistent rationale of the cases is that a vital governmental interest in, for example, national self-protection, *Martinez-Fuerte*, 428 U.S. 543, in the safety of judicial officers, *McMorris*, 567 F.2d 897, or in combatting terrorism and hijacking, *Davis*, 482 F.2d at 897, may justify a minimal intrusion. We do not consider breath, blood or urine testing to be similarly minimal intrusions. *See Storms*, 600 F. Supp. at 1220 (urinalysis entitled to same level of scrutiny accorded body cavity searches because both offend human dignity and privacy and both are degrading); *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa

1985) ("[U]rine is discharged and disposed of under circumstances where the person has a reasonable and legitimate expectation of privacy." Court also found significant the interest in maintaining privacy in personal information contained in body fluids.), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987); *Tucker v. Dickey*, 613 F. Supp. 1124 (W.D.Wis. 1985) (urinalyses and body cavity searches equally degrading).

We still must decide what standard governs inquiry into the reasonableness of such a drug testing program. The Supreme Court has provided some guidance for determining the applicable standard of reasonableness although it has expressly declined to address the proper standard for analyzing employee drug and alcohol testing. *O'Connor*, 107 S. Ct. at 1504 n.**.

3. *Reasonableness*

The Supreme Court has said that determining the "standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *O'Connor*, 107 S. Ct. at 1499 (quoting *United States v. Place*, 462 U.S. 696, 702 (1983)); *National Fed'n of Fed. Employees*, 818 F.2d at 942.

In this case, on one side of the balance are the railroad employees' reasonable expectations of privacy, *T.L.O.*, 469 U.S. at 338, *O'Connor*, 107 S. Ct. at 1497-99, and on the other side is the governmental interest in the safe and efficient operation of the railroads for the benefit of railroad employees and the public affected by that operation. *See O'Connor*, 107 S. Ct. at 1501 (government in-

terest in efficient and proper operation of the workplace justifies search of employee's desk and files); *National Fed'n of Fed. Employees*, 818 F.2d at 942 (government interest in efficient operation of the workplace offered as justification for drug testing of federal employees); *McDonell*, 809 F.2d at 1308 (government interest in determining whether prison personnel are using or abusing drugs which would affect their ability to safely perform their work may support the reasonableness determination).

We believe that accommodation of railroad employees' privacy interest with the significant safety concerns of the government does not require adherence to a probable cause requirement. *Cf. T.L.O.*, 469 U.S. at 341. In this case, as in *T.L.O.*, the legality of the search for evidence of drug or alcohol impairment depends on the reasonableness, under all the circumstances of the search. To be reasonable, the search must satisfy both prongs of a two-prong test. First, we must determine "whether the [search] was justified at its inception," *T.L.O.*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Second, we must determine "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' " *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 20).

a. *Justified at Inception*

Finding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought. In *O'Connor* this standard meant there had to be reasonable grounds for suspecting the search of an

employee's office would turn up evidence that he was guilty of work-related misconduct. 107 S. Ct. at 1503. In *T.L.O.* this standard meant there had to be reasonable grounds for suspecting that the search of a student's purse would turn up evidence that the student had violated or was violating the law or school rules. 469 U.S. at 342. In our case, this standard means there must be reasonable grounds for suspecting the search will turn up evidence the employee has violated the industry rule and federal regulation, 49 C.F.R. § 219.101, prohibiting possession or use of alcohol and controlled substances on the job and prohibiting working while under the influence of alcohol or drugs.

The Supreme Court has not determined whether "reasonable grounds for suspecting" necessarily means that there must be individualized or particularized suspicion. *O'Connor*, 107 S. Ct. at 1503; *T.L.O.*, 469 U.S. at 342 n.8. These cases both involved searches of property,[13] not persons, and in both cases individualized suspicion did exist, but the Court refused to say that it was an irreducible minimum of a reasonable search. *O'Connor*, 107 S. Ct. at 1503; *T.L.O.*, 469 U.S. at 342 n.8.

We hold that particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception. Accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug

---

[13] The holding of *T.L.O.* appears to be broader than the facts required, in that the Court said "[W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority." 469 U.S. at 340. As we have discussed, dispensing with the warrant requirement does not end the inquiry into the reasonableness of a search, which requires different degrees of suspicion to warrant different degrees of intrusion.

impairment in any one railroad employee, much less an entire train crew. Broad based testing, without particularized suspicion, such as that mandated by the new regulations, 49 C.F.R. §§ 219.201, 219.301(b)(2) and (3), has been frequently disapproved. *See, e.g., Amalgamated Transit Union,* 663 F. Supp. at 1568 (random testing of bus drivers unreasonable with less than reasonable suspicion); *Feliciano,* 661 F. Supp. at 589 ("a reasonable individualized suspicion that a police officer is using illicit drugs must be required for urinalysis to be reasonable"); *American Fed'n Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (federal police officers cannot be tested without reasonable suspicion); *Lovvorn,* 647 F. Supp. 857 (firefighters cannot be tested without individualized suspicion); *Capua*, 643 F. Supp. 1507 (random testing of firemen and policemen unconstitutional); *Patchogue-Medford Congress of Teachers v. Board of Education,* 70 N.Y.2d 57 517, N.Y.S.2d 456, 510 N.E.2d 325 (1987) (teachers cannot be tested without particularized suspicion). *But see National Treasury Employees Union,* 816 F.2d 170 (customs officials may be required to take test when they apply for certain sensitive jobs); *McDonell*, 809 F.2d 1302 (prison guards may be subjected to uniform or systematic random urine testing); *Shoemaker*, 795 F.2d 1136 (jockeys may be subjected to random urinalysis and uniform breathalyzer tests).

We think when testing is undertaken to detect drug or alcohol abuse as a means of improving the safe operation of a railroad, it poses no insuperable burden on the government to require individualized suspicion. The reasonable suspicion standard currently codified at 49 C.F.R. §§ 219.301(b)(1) and (c)(2) is adequate to safeguard the privacy expectations of railroad employees, and we believe it should be incorporated into the mandatory testing provisions set out in 49 C.F.R. § 219.201 and the other authorized testing provisions set out in 49 C.F.R. § 219.301(b)(2) and (3).

Requiring particularized suspicion before testing for drug or alcohol impairment comports with the great weight of authority holding that a warrantless search of a person is unconstitutional without a degree of specific suspicion. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal . . . ." *T.L.O.*, 469 U.S. at 342 n.8. *See e.g., McMorris v. Alioto,* 567 F.2d 897 (9th Cir. 1978) (pat-down search of visitor to courthouse more intrusive than magnetometer search and can be performed only with suspicion caused by activation of magnetometer); *Thorne v. Jones,* 765 F.2d 1270, 1277 (5th Cir. 1985) (reasonable suspicion standard governs strip searches of visitors to prison), *cert. denied,* 475 U.S. 1016 (1986); *Hunter v. Auger,* 672 F.2d 668 (8th Cir. 1982) (same); *Security & Law Enforcement Employees v. Carey,* 737 F.2d 187, 204-05 (2d Cir. 1984) (reasonable suspicion standard governs strip searches of correction officers); *United States v. Ogberaha,* 771 F.2d 655, 658 (2d Cir. 1985) (reasonable suspicion governs strip searches at the border), *cert. denied,* 474 U.S. 1103 (1986); *Henderson v. United States,* 390 F.2d 805 (9th Cir. 1967) (same).

Although we hold that the testing provisions in 49 C.F.R. §§ 219.201 and 219.301(b)(2) and (3) are constitutionally infirm because they do not meet the first prong of the reasonableness test, we turn to a consideration of the second prong.

b. *Related in Scope*

The second prong of the reasonableness test is whether the search is reasonably related in scope to the circum-

stances which justified the interference in the first place. *T.L.O.*, 469 U.S. at 341. In *T.L.O.* the Court indicated that a search of a school child which was justified at its inception would also be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. *Id.* at 342. We apply this standard to the regulations as they would stand with particularized suspicion incorporated as a necessary predicate to all testing.

The professed purpose of the testing program is to detect current drug intoxication and impairment and thereby to improve rail safety through the deterrent effect of the testing. We see one flaw in the reasonableness of this approach to the problem. Blood and urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment. *See Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987); Dubowski, Dr., *Drug-Use Testing: Scientific Perspectives*, 11 Nova L. Rev. 415, 526-29 (1987); Hudner, *Urine Testing for Drugs*, 11 Nova L. Rev. 553, 556-57 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L. Rev. 605, 632 (1987). Rather, the state of the art drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug. Joseph, *supra* at 632. For this reason we think it imperative that drug testing be undertaken only when there is individualized suspicion because the combination of observable symptoms of impairment with a positive result on a drug test would provide a sound basis for appropriate disciplinary action. The literature on drug testing is replete with references to the unreliability of results. *See Testing for Drug Use in the American Workplace: A Symposium*, 11 Nova L. Rev. (1987) *passim*. Requiring individualized suspicion would help to alleviate some of the harsh consequences of exclusive reliance on test results.

If individualized suspicion becomes a predicate for all testing the regulations should withstand scrutiny under the scope prong of the reasonableness standard. Although body fluid testing is highly intrusive, if it were occasioned only by individualized suspicion, the intrusion would not be excessive in light of the nature of the suspected rule violation. *Cf. T.L.O.*, 469 U.S. at 342.

The manner of conducting the tests is generally reasonable in that they are performed in medical facilities. 49 C.F.R. § 219.203(c). The intrusiveness of the process of urine testing has been reduced as much as is practicable in that only personnel of the medical facility may supervise the sample collection. 49 C.F.R. § 219.305(a).

The implied consent provision, 49 C.F.R. § 219.11[14] adds little to the reasonableness of the testing program although it does put employees on notice that they may be required to submit to such tests. *See National Treasury Employees Union*, 816 F.2d at 178. The consent feature does not add to the reasonableness in our case as it did in *National Treasury Employees Union* because there an employee could totally forego drug screening with no adverse inferences if he withdrew his application for a job transfer. *Id.* Railroad employees do not have that option.

---

[14] § 219.11(a) provides "Any employee who performs covered service for a railroad on or after February 10, 1986, shall be deemed to have consented to testing as required in Subpart C and D of this part; and consent is implied by performance of such service.

If individualized suspicion is included in the preconditions for testing, we would conclude that the least intrusive means have been selected to meet the legitimate governmental objectives of the tests. *See id.* at 180. We are less convinced of the effectiveness of the tests in detecting drug impairment, *id.*, but think the program will serve reasonably well as a deterrence to on-the-job use of drugs and alcohol.

D. ***Consent***

FRA argues the rule satisfies the fourth amendment even under the stricter standard of reasonable suspicion because of the implied consent provision in 49 C.F.R. § 219.11. It is clear that valid consent to a search eliminates the need for a warrant of probable cause. *United States v. Mendenhall,* 446 U.S. 544 (1980); *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). However, when a search has been determined to be constitutionally unreasonable, the consent feature cannot save it. *National Fed'n of Fed. Employees,* 818 F.2d at 943. As one court expressed it, "advance consent to future *unreasonable* searches is not a reasonable condition of employment." *McDonell,* 612 F. Supp. at 1131 (emphasis in original).

E. ***Conflicting Authority***

We are mindful that our decision may be seen as conflicting with decisions of other circuits. *E.g. National Treasury Employees Union,* 816 F.2d 170; *McDonell,* 809 F.2d 1302; *Shoemaker,* 795 F.2d 1136; *Division 241 Amalgamated Transit Union v. Suscy,* 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976).

In *National Treasury Employees Union,* the Fifth Circuit considered a plan for testing customs officials seeking

transfer to jobs which involve interdiction of illicit drugs, require carrying of a firearm or involve access to classified information. 816 F.2d at 173. As a voluntary screening test for those applying for transfers, this program is similar to FRA rules for pre-employment drug screens codified at 49 C.F.R. Part 219, Subpart F. These rules are not before us, and of course we express no opinion as to their constitutionality. We do not think the factors the Fifth Circuit considered in analyzing the reasonableness of the testing program, 816 F.2d at 177-82, are precisely the factors we consider relevant, because the court did not consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception, *O'Connor,* 107 S.Ct. at 1503; *T.L.O.,* 469 U.S. at 341.

Likewise, the *McDonell* court did not pose this question in analyzing and upholding the reasonableness of uniform or systematic random testing of prison guards. 809 F.2d at 1308. Rather the court simply weighed the strong interest in prison security against the urinalyses which it held to be relatively less intrusive than body searches and found the intrusion into the guards' expectation of privacy to be reasonable. *Id.* We do not agree that urine testing is a lesser intrusion than body searches.

We have already indicated that *Shoemaker* is distinguishable because the Third Circuit adopted the pervasively regulated industry rationale to uphold testing of jockeys and we do not consider that rationale applicable to the employees in our case. 795 F.2d at 1141-42.

Finally, we do not consider the analysis of the *Suscy* court to be particularly persuasive, even though the case, because it involves bus drivers, is factually similar to the case before us. 538 F.2d 1264. The Seventh Circuit held,

without very thorough analysis, that bus operators have no reasonable expectation of privacy and that even if they did, the tests given were reasonable because they were given only to operating employees directly involved in serious accidents or suspected by two supervisory employees of being under the influence. *Id.* at 1267. *See* Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment,* 24 Am. Business L. J. 309, 324-25 (1986) (criticizing *Suscy* reasoning). Our evaluation of the reasonableness of the tests at issue in this case is that they fail to meet the requirement of being justified at their inception by an expectation the tests will reveal the sought after information. Because the *Suscy* court did not apply that test, its conclusions do not influence the outcome in our case.

II. STATUTORY ARGUMENTS

RLEA raises a number of statutory objections to the regulations which we find unpersuasive.[15] RLEA suggests that the regulations violated the Federal Railroad Safety Act in that the FRA lacks the statutory authority to delegate testing under Subpart D to the railroads, and to permit them to conduct it without particularized suspicion. This argument is without merit. 45 U.S.C. § 437(a) authorizes the Secretary to delegate to any qualified persons functions respecting examination, inspection and testing of persons as necessary to carry out the provisions of that subchapter. Thus, because the Secretary has the power to perform the searches in question here, he has the power to delegate that authority to other qualified persons.

[15] The district court did not reach any of these questions but because they are legal issues we need not remand for further consideration.

The RLEA argues from *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), which addressed warrantless inspections to enforce OSHA, that any statutory scheme mandating warrantless searches is constitutionally infirm. *Marshall* does not go so far. The Court specifically stated it was concerned only with OSHA, and that the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321. Thus, the scheme at issue in this case need only pass constitutional muster on its own terms.

RLEA also argues that the regulations violate the Federal Rehabilitation Act by unlawfully discriminating against the handicapped by causing dismissal of employees who can perform their jobs despite drug or alcohol use. The Federal Rehabilitation Act prohibits discrimination against otherwise qualified handicapped individuals by any program receiving federal financial assistance. 29 U.S.C. § 794 (1982). Assuming the Act applies to railroads, since they generally receive federal assistance or have federal contracts, it is clear the testing regulations are not violative of the Rehabilitation Act.

The regulations do not mandate any discriminatory treatment of those who are handicapped, or even of those who "flunk" the drug or alcohol tests. Any disciplinary action is left up to the individual employers and is a subject for collective bargaining between the unions and railroads.

Furthermore, the Rehabilitation Act does not cover alcoholics or drug abusers whose employment, by reason of current alcohol or drug abuse, would constitute a threat to property or safety. 29 U.S.C. § 706(7)(B). It appears from the plain language of the statute that only alcoholics or drug abusers whose problems are under control are protected from discriminatory treatment.

Finally, RLEA argues that the regulations violate protections of the Railway Labor Act by denying employees

the right to have union representation at the testing procedures. This argument has no merit. It derives the right to have a representative present from the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, the Court held that an employer's refusal of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8(a)(1) of the N.L.R.A., 29 U.S.C. § 158(a)(1), because it interfered with § 7 rights to engage in concerted activity. 29 U.S.C. § 157. 420 U.S. at 252-53.

Weingarten does not control this case. The Court specified that the right to union representation arises only upon the employee's request. *Id.* at 257. Here, the regulations are silent as to a person's right to have representation, and the situation has not yet arisen in which an employee has asked for and been refused such representation. Thus, the question is not ripe for review.

III. OTHER CONSTITUTIONAL OBJECTIONS

RLEA contends that, in addition to its constitutional infirmity under the fourth amendment, the rule also impermissibly impinges on the fundamental right of privacy. *See Roe v. Wade*, 410 U.S. 113 (1973). The privacy interest protected by *Roe v. Wade* and its progeny has not been fully delineated, *see Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), but thus far has been extended to include interests in autonomous decision making in the areas of family planning and contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and family living arrangements. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Any right to

personal autonomy in choosing to use alcohol or drugs has not yet been protected, although there is a parallel right to keep certain information about drug use private. *Whalen v Roe*, 429 U.S. 589 (1977). In *Whalen* the Court found the gathering and storage of data pertaining to prescription drug use did not pose a grievous threat to the privacy interest in avoiding disclosure of personal matters or the privacy interest in independent decision making.

The Third Circuit held that one aspect of the reasonableness of the jockey testing program was the guarantee of confidentiality incorporated in the statutory scheme. *Shoemaker*, 795 F.2d at 1144. The regulations before us lack this safeguard, but we believe the time to litigate the question is after some inappropriate breach of confidentiality.

RLEA's final constitutional argument is that the regulations are underinclusive and thus offend due process by arbitrarily discriminating among similarly situated classes of persons. Of course the equal protection provisions of the fourteenth amendment have been made applicable to the federal government through the due process clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). But equal protection requires only that there be a rational relationship between a classification scheme and a legitimate government objective. *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982). The objective of railway safety is unquestionably legitimate. The targeting for testing of employees covered by the Hours of Service Act, 45 U.S.C. §§ 61-66, and employees performing the same services as covered employees, 49 C.F.R § 219.5(d), is reasonably related to the goals of the testing program. The Hours of Service employees are "individual[s] actually engaged in or connected with the movement of any train." 45 U.S.C. § 61(b)(2). Congress enacted this legislation to enhance

railroad safety by regulating the hours of employees most involved in the operation and therefore most responsible for the safe operation of trains. It makes sense to mandate drug and alcohol testing of the same group for the same reasons.

But RLEA argues this does not permit testing of supervisory employees who may also be responsible for railway accidents. However, as FRA points out, supervisory personnel are already subject to testing at the discretion of the railroads, and if they perform any "covered service" they will be subject to testing under the new rule too. Thus, the rule does not offend the equal protection clause.

CONCLUSION

Because the district court applied the wrong legal standard in evaluating the fourth amendment issue in this case, it erroneously granted summary judgment for FRA. Applying the test of reasonableness we conclude that intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment. The judgment of the district court is REVERSED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

The primary issue before this court is whether the district court correctly determined that the Federal Railroad Administration's regulations requiring restraints to conduct blood or urine tests of crew members after serious accidents or incidents and authorizing the conduct of breath or urine tests, upon reasonable suspicion or upon an indication of a deficiency in an employee's safety sensitive functions as a result of an employee's involvement in certain accidents, incidents or rule violations, do not violate the fourth amendment. The district court concluded that, because railroads and railway employees are closely regulated by the government to promote public safety, the balance between this valid governmental interest and the right of an individual to be free from an invasion of privacy must be struck in favor of the regulatory scheme. I would affirm the district court's judgment.

I

The majority has concluded that, notwithstanding that railroads are closely regulated industries, the exception to the requirement of a warrant and probable cause for searches involving closely regulated industries does not apply to the search of the employees of such enterprises. The majority's decision is in direct conflict with the Third Circuit's opinion in *Shoemaker v. Handel,* 795 F.2d 1136 (3rd Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S. Ct. 577. In *Shoemaker,* the court held that warrantless breathalyzer and urine tests of voluntary participants in the highly regulated horse racing industry are reasonable under the fourth amendment. The majority in the instant matter attempt [*sic*] to distinguish *Shoemaker* on the ground that in the regulation of horse racing, jockeys are "the principal

regulatory concern." Majority op. at 21. In further support of its refusal to follow *Shoemaker,* the majority states, "[i]n contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities." *Id.*

Contrary to the majority's argument, the government has a long tradition of regulating the conduct of railway personnel to promote public safety. The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs. As early as 1907, for example, Congress set limits on the number of working hours industry personnel may undertake per day. 45 U.S.C. § 62(a)(1) (1982). This legislation:

> was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions.

Atchison, T. & S.F. Ry. Co. v. United States, 244 U.S. 336, 342 (1916).

The government has promulgated a number of regulations which mandate safe working practices by railroad personnel. *See e.g.,* 49 C.F.R. §§ 218.1-218.30 (1986) (requiring that workers follow certain prescribed safety procedures when co-workers are engaged on rail tracks); 49 C.F.R. § 218.37 (1986) (requiring that workers follow certain prescribed safety procedures when trains are running at reduced speeds); 49 C.F.R. § 220.61 (1986) (requiring certain prescribed safety procedures be followed when transmitting or receiving orders). Additionally, Congress

has declared that railroad personnel can be held criminally liable for violating certain safety rules. *See* 49 U.S.C. § 1801 (1982) (providing criminal penalties from the knowing transportation of hazardous materials); *see also* 45 U.S.C. § 438 (1982) (criminal penalties for false entries in accident reports).

The majority also reasons that railroad workers, unlike jockeys, do not have diminished expectations of privacy with respect to their use of drugs or alcohol. Majority op. at 20. This argument ignores the fact that railway employees were subject to safety rules such as the one denominated as Rule G in the companion cases to this matter *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.,* No. 85-4137 and 85-4138, which, for a substantial period of time, have prohibited the use of alcohol and controlled substances by employees subject to duty or while on duty and required railway personnel suspected of use to submit to a blood or urine test to clear themselves of suspicion. *See Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.,* 620 F. Supp. 163, 169-172 (D. Mont. 1985).

Because the activities of railway *personnel* are closely regulated to promote safety, I would adopt the well-reasoned opinion in *Shoemaker,* and hold that the closely regulated industry exception to the requirement of a warrant and probable cause applies to blood, breath, and urine tests of railway employees under the specific circumstances prescribed in the regulations challenged in this action.

II

A search of a closely-regulated industry "will be deemed to be reasonable," *New York v. Burger,* ____ U.S. ____,

107 S. Ct. 2636, 2643 (1987), if it meets the following three criteria:

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made . . . .
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . .
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."

Id. at 2644 (quoting *Donovan v. Dewey,* 452 U.S. 594, 601-03 (1981); *see Balelo v. Baldridge,* 724 F.2d 753, 764-65 (9th Cir. 1984) (en banc), *cert. denied,* 467 U.S. 1252. The searches mandated by 49 C.F.R. § 219.201 satisfy this three-pronged test.

The government has a "substantial" interest in requiring that tests be conducted to assure that railroad employees avoid drug or alcohol use which might affect their ability to perform their jobs safely. Drug usage among railroad personnel has been implicated as a potential cause of numerous train accidents which resulted in injury and death. Two such accidents are noted in the companion cases to this matter, *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, Nos. 85-4137 and 85-4138. These accidents caused seven deaths and over $3 million in property damage. These tragic events were not isolated incidents. They are two examples of a long line of alcohol or drug-related tragedies. *See generally* T. Manello & F. Seaman, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads* (Department of Transportation Report No. DOT-TSC-1375, 1979). The threat posed by alcohol and drug-related railroad accidents is particularly dangerous in light of the fact that extremely

hazardous materials are often transported by rail. *See generally* National Transportation Safety Board, Pub. No. NTSB/RAR/83/05, *Railroad Accident Report—Derailment of Illinois Central Gulf Railroad Freight Train Extra 9629 East (GS-2-28) and Release of Hazardous Materials at Livingston, Louisiana, September 28, 1982* (1983) (describing an alcohol-implicated train wreck which resulted in a chemical spill requiring the evacuation of a community of 300 persons for a period of two weeks).

Second, warrantless inspections are "necessary to further [the] regulatory scheme." *Burger,* 107 S. Ct. at 2644 (quoting *Donovan,* 452 U.S. at 600). As the majority recognizes, "the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant." *Cf. Schmerber v. California,* 384 U.S. 757, 770 (1966) (sanctioning warrantless blood testing in drunk driving cases).

Finally, the testing procedures set out in the regulatory scheme " 'provid[e] . . . constitutionally adequate substitute[s] for a warrant.' " *Burger,* 107 S. Ct. at 2648 (quoting *Donovan,* 452 U.S. at 603). 29 C.F.R. 219.201 *mandates* testing upon the occurrence of an accident or rule violation. Thus, railroad employees know "that the inspections to which . . . [they are] subject do not constitute discretionary acts by . . . official[s] but are conducted pursuant to . . ." regulation. *Burger,* 107 S. Ct. at 2648.

The " 'time, place, and scope' of the inspection[s]", *id.* (quoting *United States v. Biswell,* 406 U.S. 311, 315 (1972)), are brought within reasonable bounds by other provisions of the regulatory scheme. Under 49 C.F.R. § 219.205(b), testing must take place "as soon as possible" after the occurrence of an event specified in section 219.201. Under 49 C.F.R. §§ 219.205(c) and 215.305(a),

tests must be conducted by qualified independent medical personnel at independent medical facilities. Finally, regulations such as 49 C.F.R. § 219.307(2)(b) limit the scope of testing to determining whether drugs or alcohol are present in the subject's blood or urine.

The blood and urine testing program clearly satisfies the three-pronged test established in *Donovan* and *Burger*. Accordingly, I would hold that the contested regulations do not violate the fourth amendment.

III

Reliance on the closely regulated industry exception to the fourth amendment requirement of a warrant and probable cause is *not* necessary to uphold the government's regulations requiring blood and urine tests under carefully prescribed circumstances.

To survive traditional fourth amendment scrutiny, a search must be "reasonable." *O'Connor v. Ortega*, ___ U.S. ___, 107 S. Ct. 1492, 1502-03.

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' . . .; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' . . . ."

Id. at 1503 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985), and *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The majority's opinion in this matter is also in conflict with decisions of the Fifth Circuit, the Seventh Circuit, the Eighth Circuit, and the District of Columbia Circuit holding that government-compelled drug-testing programs were reasonable under the fourth amendment.

Whether a search is "justified at its inception," involves a careful " 'balancing [of] the need to search . . . against the invasion which the search . . . entails.' " *Terry*, 392 U.S. at 21 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)). This balancing test was applied by the Fifth, Seventh, Eighth and District of Columbia Circuits to determine the reasonableness of toxicological drug testing programs in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), and *Jones v. McKenzie*, No. 86-5198, slip op. (D.C. Cir. Nov. 17, 1987), and *Division 241 Amalgamated Transit Union v. Suscy*, 538 F. 2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029.

In *Von Rabb*, a union representing employees of the Customs Service mounted a fourth amendment challenge to "a program adopted by the Customs Service requiring employees seeking transfer to certain sensitive jobs to submit to urine testing for drug use." 816 F.2d at 172. The Service initiated the program because its employees "are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use . . . as well as [to] illegal substances themselves." *Id.* at 173. Applying the balancing test, the Fifth Circuit determined that the urine tests were intrusive and undertaken without individualized suspicion, and considered these two factors weighed against finding the program reasonable. *Id.* at 175-77. The court held, however, that these factors were more than outweighed by: (1) the Service's compelling need to assure that its employees maintained integrity, *id.* at 177-78; and (2) the diminished privacy expectations of Service employees, who know from the very nature of their profession "that inquiry may be made concerning their off-the-job use of drugs," *id.* at 180. Persons involved in operating trains should also be presumed to

know that inquiry concerning their off-duty drug and alcohol use is likely because of the danger to others that would flow from operating a train while under the influence of such substances.

In *McDonell,* the Iowa Department of Corrections required correctional officers to submit to urine, blood and breath testing at the request of Department officials. 809 F.2d at 1304. The Department initiated the testing program "to maintain security and intercept contraband." *Id.* at 1306. Applying the balancing test, the Eighth Circuit noted that prison employees [*sic*] "expectations of privacy are diminished while they are within the confines of the prison." *Id.* It found that the Department had a compelling need to determine "whether corrections employees are using or abusing drugs which would affect their ability to safely perform their work within the prison." *Id.* at 1308. The court found this necessity outweighed the correctional officers' diminished privacy interests:

> Because the institutional interest in prison security is a central one, because urinalyses are not nearly so intrusive as body searches, ... and because this limited intrusion into the guards' expectation of privacy is, we believe, one which society will accept as reasonable, we . . . hold that urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons.

Id. at 1308. Similarly, the government had a compelling need to ensure that railway employees be free of alcohol or controlled substances in propelling locomotives across this nation.

In *Jones,* a transportation worker employed by the District of Columbia school system challenged the District's mandatory urine testing program. The program

was initiated in response to "repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while on duty." Slip op. at 3. Applying the balancing test, the District of Columbia Circuit held that urine tests intrude heavily upon the employees' privacy interests and thus "can be outweighed only by strong governmental concerns." *Id.* at 10. The court held, however, that the government's safety concerns were sufficiently compelling to tip the balance against these interests. *Id.* Thus, it held that the tests were justified at the inception:

> There can be no doubt whatsoever that the School System's mission of safely transporting . . . children to and from school cannot be ensured if employees . . . are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous. . . .
>
> [T]he danger to a young . . . child, should she be dropped by an attendant or ignored while crossing the street, is obvious. In light of these safety concerns, we find that the School System acted pursuant to a significant and compelling governmental interest in requiring drug testing for Transportation Branch employees as a part of routine employment-related medical examinations.

Id. at 10-11 (footnote omitted). The need to prevent injury or death to pedestrians or motorists in the path of a locomotive operated by substance and alcohol abusers is equally compelling.

In *Suscy,* a bus drivers union challenged a Chicago Transit Authority requirement that "bus operators . . . submit . . . blood and urine tests when they are involved in 'any serious accident.' " 538 F.2d at 1266. Applying the balancing test, the Seventh Circuit held that the clash of interests weighed in favor of holding the tests constitu-

tional: "Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Id.* at 1267.

I would adopt the analysis set forth in these cases to the matter at hand, and hold that the urine and blood examinations mandated by 49 C.F.R. § 219.201 are justified at the inception. I would also recognize that the blood and urine tests required by the regulation are intrusive and hold, nevertheless, that they can be performed in the absence of individualized suspicion. I would hold that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests. As recent history attests, locomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands. The threat posed by drug or alcohol impaired railroad workers transporting hazardous materials across this nation is *far* graver than the potential danger presented by the customs officers in *Von Rabb*, the prison guards in *McDonell* or the transportation workers in *Jones* and *Suscy*.

The Supreme Court has instructed us to " 'balanc[e] the need to search . . . against the invasion which the search . . . entails' " in determining whether a search is justified at the inception. *Terry*, 392 U.S. at 21 (emphasis added) (quoting *Camara*, 387 U.S. at 534-35). The majority in the instant matter has failed to engage in the balancing of interests required by the Court. Instead, the majority focuses solely on the degree of impairment of the workers' privacy interests. Finding that the blood and urine tests are intrusive, the majority quickly proceeds to the conclusion that the tests are not justified at the inception because they are not initiated as the result of individualized suspicion of drug or alcohol use. Majority op. at 25-29.

The second inquiry under the "reasonableness" test is whether the search is " 'reasonably related in scope to the circumstances which justified the interference in the first place.' " *O'Connor*, 107 S. Ct. at 1503 (quoting *T.L.O.*, 469 U.S. at 341) "[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive . . . ." *T.L.O.*, 469 U.S. at 342.

As discussed above in relation to the closely-regulated industry test, the searches mandated by 49 C.F.R. § 219.201 are not excessively intrusive. The regulatory scheme provides safeguards which bring the time and place of the testing within reasonable bounds.

The question remains whether the tests "are reasonably related to the objectives of the search." *T.L.O.*, 469 U.S. at 342. The majority concludes that the urine tests bear no reasonable relationship to the program objective of discovering on-the-job drug or alcohol use because they are overbroad: "[T]he tests cannot measure current drug intoxication or degree of impairment. Rather, the state of the art drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug." Majority op. at 29-30 (citations omitted).

The regulatory scheme contains adequate safeguards to counter the problem of overbreadth. 49 C.F.R. § 219.309 (1986) requires the railroads to inform their workers of the overbreadth problem presented by urine tests, and to counsel them to take a blood test if they have ingested drugs anytime within the previous sixty days. Section 219.309(b)(2) requires that railroads provide their workers with the following notice:

> Under Federal Railroad Administration (FRA) safety regulations, you may be required to provide a

urine sample after certain accidents and incidents or at any time the company reasonably suspects that you are under the influence of, or impaired by, drugs while on duty. *Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to sixty days before the sample is collected).* As a general matter, the test cannot distinguish between recent use off the job and current impairment. However, the Federal regulations provide that if only the urine test is available, a positive finding on that test will support a presumption that you were impaired at the time the sample was taken.

You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. *The blood test will provide information pertinent to current impairment.* Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.

If you have used any drug off the job (other than a medication that you possessed lawfully) in the prior sixty days, it may be in your interest to provide a blood sample. If you have not made unauthorized use of any drug in the prior sixty days, you can expect that the urine test will be negative; and you may not wish to provide a blood sample.

49 C.F.R. § 219.309(b)(2) (1986) (emphasis added).

The warning required by section 219.309 protects employees from any mistake that might result from the "sensitivity" of the urine testing procedure. The searches mandated by 49 C.F.R. § 219.201 are reasonably related to the objective of determining whether railroad workers are intoxicated on the job.

CONCLUSION

I would affirm the judgment of the district court. The railroad industry is closely regulated because of the serious danger presented by the negligent operation of trains across this nation by alcohol or drug-impaired railway employees. Railroad industry employees have long been restricted by safety rules from ingesting alcohol or controlled substances prior to or during the operation of trains. The government has also imposed safety laws and regulations aimed at protecting the safety of the public and co-workers. Thus, railway employees have a diminished expectation of privacy concerning the detection of their alcohol or drug use.

The closely regulated industry exception to the requirements of the fourth amendment should be applied to these employers [*sic*] who operate the nation's railroads because of the incalculable risk to public safety posed by alcohol or drug impaired train crews. In balancing the intrusion engendered by blood and urine tests against the risk to lives and property posed by intoxicated train crews, we should hold that such searches are reasonable and consistent with the requirements of the fourth amendment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-85-7958-CAL

RAILWAY LABOR EXECUTIVES' ASSOCIATION, 400 FIRST STREET, N.W. WASHINGTON, D.C.

AND

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT, THE SOUTHERN PACIFIC TRANSPORTATION COMPANY, SUITE 201, 1860 EL CAMINO ROAD, BURLINGAME, CALIFORNIA 94010

AND

BROTHERHOOD OF LOCOMOTIVE ENGINEERS GENERAL COMMITTEE OF ADJUSTMENT, THE SOUTHERN PACIFIC TRANSPORTATION COMPANY, 38750 PASEO PADRE PARKWAY, FREEMONT, CALIFORNIA 94536

AND

BROTHERHOOD OF RAILROAD SIGNALMEN, 601 WEST GOLF ROAD, MOUNT PROSPECT, ILLINOIS 60056
PLAINTIFFS

vs.

ELIZABETH DOLE, SECRETARY OF TRANSPORTATION, 400 SEVENTH STREET, S.W., WASHINGTON, D.C.

AND

JOHN R. RILEY, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION, 400 SEVENTH STREET, S.W., WASHINGTON, D.C.
DEFENDANTS

November 26, 1985

Before: The Honorable Charles A. Legge, Judge

* * * * *

THE COURT: Now, it seems to me the one decision I will make here that you can both agree on and perhaps the only one you will agree on is, I do not think that there is much point in my taking this matter under submission and writing a lengthy opinion on it.

I anticipate that whatever the side that does not prevail here will seek an appeal. This is almost a pure issue of law and I'm sure the ninth circuit opinion will be heard on it. And it seems to me that I could perform a better function for all of your clients by making my ruling now, stating the reason for it and then enabling you to get on with whatever processes there are for the appeal. And that is not to say that I have not given some very lengthy consideration to the law and the possibility of writing an opinion on this, and, indeed, my clerks and I have spent many, many hours wrestling with these issues.

What I find is, this situation is one which is not neatly covered by either the plaintiffs' or the government's side of the case and where he represents the following.

So for that the reason, I will state for the record what my reasons are so that the court of appeals will have an adequate opportunity to review that reasoning and apply their own reasoning.

Nevertheless, I don't think a lengthy written opinion and a lengthy period of submission is going to serve the interest of either of your clients or the public.

We are here on cross motions for summary judgment by both the plaintiff and the government. As I said before, I think's it's clear from the record that there are no factual issues. That is, that this is a case that is suitable for summary judgment under rule 56.

As I said at the beginning, the basic issue, I believe, is the fourth amendment. I don't believe that there is much

merit to the plaintiffs [*sic*] other challenges to this regulation other than the fourth amendment.

So with respect to the fourth amendment analysis, it's clear that the fourth amendment does prohibit unreasonable searches and seizures and these processes here are indeed searches, certainly intrusive in the sense of a blood test, less intrusive in the sense of urine and breath tests.

Generally, the fourth amendment requires an issuance of a warrant or a finding of probable cause, and it's clear that under the regulations and now, those procedures will be required.

So the issue becomes whether this matter falls within a judicially recognized exception to the requirement for a warrant and probable cause.

The government seeks the application of the exception which deals with the searches involved in connection with highly regulated industries.

Now, in evaluating the application of that exception, I am required under the fourth amendment analysis to do a balancing of the considerations. That is, the fourth amendment prohits unreasonable searches and seizures, not all searches and seizures, but unreasonable ones and requires in dealing with these exceptions that the consideration be balanced.

In connection with those balancings, the government certainly has a valid public and governmental interest in the production of in the promotion of safety and railway safety, safety for employees, and safety for the general public that is involved with the transportation. It's also obvious from the length of time and the detail in which the regulations have gone that the government has made a sincere attempt to gathering together information and do some balancing of interests on its own.

The individuals, on the other hand, have a valid interest in the integrity of their own bodies from protection of overly invasive, unreasonable invasive tests, and a valid concern over the import and impact of this testing procedure on their employment.

I'm going to tell you now how I'm striking that balance and then I will take the rest of the suspense out of this and get on to the reasons for it.

I am going to hold that the plaintiffs [*sic*] motion for summary judgment is to be denied and the government's motion for summary judgment is to be granted.

In essence, the balance is being struck in favor of the regulatory scheme rather than the individual fourth amendment rights as they apply in this case.

The reason is the following: that it is true that the railroad industry is one of the most extensively regulated industries that we have in interstate commerce; and that the regulation extends not just to the railroads themselves, but a certain amount of regulation of the employees.

I believe in looking at the legislation, there is authority granted to the secretary, and hence, subdelegated to the railroad administration for the adoption of rules in the area of railroad safety. Those acts appear to be under the Railroad Safety Act, the Accident Report Act, Safety Appliance Act, and the Hours of Service Act, plus others that I'm sure I'm missing.

But my point is that, the railroad industry and railroad employees are pervasively regulated. There is an established statutory pattern for it and congress has certainly authorized the secretary to pass regulations in that field.

Now, dealing with the regulation itself. It's clear that the regulation is one that is designed to promote the objectives of safety, which is a valid governmental and public interest.

It also appears that the events that will result in testing are as well defined as a set of regulations could give it. And in the most serious cases, that is, the most pervasive cases, it is an objective event which triggers the testing. So the events requiring testing are well and precisely defined.

There is also genuine attempt on the regulations to limit the scope of the testing requirements to the needs and the events as they have occurred.

There is no coercion on the employee in the sense that nobody is telling the employee that you have to submit to a blood test and forcibly make that requirement. Blood is taken by -- blood testing is done by a medical facility. The other body tests also evaluated by an independent facility.

The railroad supervisors do have some discretion in deciding what events have occurred to trigger the testing. But that is an area where their discretion is a limited discretion. Also I do not believe it is vital to the regulation that it is nongovernmental people doing the testing. I believe the railroad safety act specifically authorizes the delegation of and the testing function to nongovernmental persons.

With respect to the consequences under the regulations, there is no direct criminal consequence. I recognize that because evidence has been taken, evidence might be obtained by certain sources, but in violation itself of the regulation, is not criminal.

The penalties under the regulations are perhaps not as well defined as the court would like them. Under Subpart C, if the employee refuses the test, it is clear that the employee is subject to nine month's [*sic*] suspension, that is certain. But the consequences under C and under D of either not taking the test or failing it are undefined. But I think there appears to be a little dispute between the parties that the consequences of those violations put the matter within the area of employee discipline and employee

management, union relationships under the collective bargaining agreements and under Rule G.

My review of the regulations indicate [*sic*] that there are circumstances throughout the regulations, although not totally throughout, of instances where hearings and notices and responses are available to the defendant employee if he deems himself to be a defendant.

There is, in addition, restrictions placed upon the railroads and also certain impositions upon them for the improper or neglectful performance of their duty.

Alternative means have been considered and discussed. It appears to me from a balancing of the means selected here by the government has been as interested as it is possible to be and to accomplish the genuine public safety interest, which is to be accomplished.

In addition, there is the consideration of the circumstances, and that is, when an accident occurs or when events occur far from the place where courts or other supervisory procedures are available, there is a real seriousness of the disappearance or loss of the evidence, loss of its value.

Now, that is my analysis of the regulations.

With respect to the applicable law. Under the guidelines of the United States Supreme Court in Schmerber and recently discussed in Winston versus Lee, I believe the Supreme Court has recognized that there can be circumstances under which blood tests are authorized and are proper under fourth amendment standards.

The line of cases cited by the government of Donovan against Dewey, U.S. against Biswell, and Colonnade versus the U.S. does support the government's position that in heavily regulated industries, the warrant -- there can be warrantless searches.

Now, those cases, indeed, do not apply to personal type searches, but as I've said, Schmerber and Winston against Lee, have indicated that blood testing under the Fourth Amendment can be proper under certain circumstances. The most nearly applicable case on it's [*sic*] facts is the Transit Union against Suscy, a decision of the Seventh Circuit. And there does definitely appear to be authority authorizing the use of blood and urine tests for transit employees.

Within our own Ninth Circuit here, it seems to me that the conclusion is supported.

And I must say parenthetically, that none of the cases I refer to really decide this case. I cite them only for the benefit of the Ninth Circuit in indicating where I think the support for my decision comes. They are not foursquare authorities in support.

Within our Ninth Circuit we have the United States versus Davis decisions and the McMorris against Alioto, which authorized searches of persons under certain circumstances.

Rush versus Obledo here in the Ninth Circuit recognized the validity of the exception for – from the fourth amendment requirements for industries that are heavily regulated.

And then the Balelo versus Baldridge dealing with observers on boats, also a Ninth Circuit decision.

All right. Now, that will be the decision of the court.

* * * * *

APPENDIX C

49 C.F.R. Part 219

Subpart B – Prohibitions

§ 219.101 Alcohol and drug use prohibited.

(a) *Prohibitions.* Except as provided in § 219.103 –

(1) No employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service;

(2) No employee may report for covered service, or go or remain on duty in covered service while –

(i) Under the influence of or impaired by alcohol;

(ii) Having .04 percent or more alcohol in the blood; or

(iii) Under the influence of or impaired by any controlled substance.

(b) *Controlled substance.* "Controlled substance" is defined by § 219.5 of this part. Controlled substances are grouped as follows: marijuana, narcotics (such as heroin and codeine) stimulants (such as cocaine and amphetamines), depressants (such as barbiturates and minor tranquilizers), and hallucinogens (such as the drugs known as PCP and LSD). Controlled substances include illicit drugs (Schedule I), drugs that are required to be distributed only by a medical practitioner's prescription or other authorization (Schedules II through IV, and some drugs on Schedule V), and certain preparations for which distribution is through documented over the counter sales (Schedule V only).

(c) *Railroad rules.* Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.

(d) *Construction.* This section shall not be construed to prohibit the presence of an unopened container of an

alcoholic beverage in a private motor vehicle that is not subject to use in the business of the railroad; nor shall it be construed to restrict a railroad from prohibiting such presence under its own rules.

§ 219.103 Prescribed and over-the-counter drugs.

(a) This subpart does not prohibit the use of a controlled substance (on Schedule II through V of the controlled substance list) prescribed or authorized by a medical practitioner, or possession incident to such use if–

(1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties; and

(2) The substance is used at the dosage prescribed or authorized.

(b) This subpart does not restrict any discretion available to the railroad to require that employees notify the railroad of therapeutic drug use or obtain prior approval for such use.

Subpart C – Post-Accident Toxicology Testing

§ 219.201 Events for which testing is required.

(a) *List of events.* On and after March 10, 1986, except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraphs (a) (1) through (3) of this section:

(1) *Major train accident.* Any train accident that involves one or more of the following:

(i) A fatality;

(ii) Release of a hazardous material accompanied by–

(A) An evacuation; or

(B) A reportable injury resulting from the hazardous material release (*e.g.*, from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of $500,000 or more.

(2) *Impact accident.* An impact accident resulting in–

(i) A reportable injury; or

(ii) Damage to railroad property of $50,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

(b) *Exception.* No test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing.

(c) *Good faith determinations.* (1) The railroad representative responding to the scene of the accident/incident shall determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative shall consider the need to obtain samples as soon as practical in order to determine the presence of absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgment in making the required determinations.

(2) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(3) A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but its [*sic*] later determined, after investigation, that one or more of the conditions thought to have required testing were not, in fact, present.

[50 FR 31568, Aug. 2, 1985, as amended at 51 FR 3975, Jan. 31, 1986]

§ 219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* (1) Following each accident and incident described in § 219.201, the railroad (or railroads) shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological testing by FRA.

(2) Such employees shall specifically include each and every operating employee assigned as a crew member of any train involved in the accident or incident. In any case where an operator, dispatcher, signal maintainer or other covered employee is directly and contemporaneously involved in the circumstances of the accident/incident, those employees shall also be required to provide samples.

(3) An employee is excluded from testing under the following circumstances:

(i) In any case of an accident/incident for which testing is mandated only under § 219.201(a)(2) of this subpart (an "impact accident") or § 219.201(a)(3) ("fatal train incident"), if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident.

(ii) The following provisions govern accidents/incidents involving non-covered employees:

(A) Surviving non-covered employees are not subject to testing under this subpart.

(B) Testing of the remains of non-covered employees who are fatally injured in train accidents and incidents is required.

(b) *Timely sample collection.* (1) The railroad shall make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident.

(2) This paragraph shall not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad shall utilize other employees to perform such duties.

(3) In the case of a revenue passenger train which is in proper condition to continue to the next station or its destination after an accident or incident, the railroad shall consider the safety and convenience of passengers in determining whether the crew is immediately available for testing. A relief crew shall be called to relieve the train crew as soon as possible.

(c) *Place of sample collection.* (1) Employees shall be transported to an independent medical facility where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

(2) In the case of an injured employee the railroad shall request the treating medical facility to obtain the samples.

(d) *Obtaining cooperation of facility.* (1) In seeking the cooperation of a medical facility in obtaining a sample under this subpart, the railroad shall, as necessary, make specific reference to the requirements of this subpart.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain a blood sample

after having been acquainted with the requirements of this subpart, the railroad shall immediately notify FRA by toll free telephone, Area Code 800-424-0201, stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required sample.

(e) *Discretion of physican.* Nothing in this subpart shall be construed to limit the discretion of a physician to determine whether drawing a blood sample is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

§ 219.205 Sample collection and handling.

(a) *General.* Samples shall be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this section and the Field Manual.

(b) *Information requirements.* In order to process samples, analyze the significance of laboratory findings, and notify the railroads and employees of test results, it is necessary to obtain basic information concerning the accident/incident and any treatment administered after the accident/incident. Accordingly, the railroad representative shall complete the information required by FRA Form 6180.73 for shipping with the samples. Each employee subject to testing shall cooperate in completion of the required information on FRA Form 6180.74 for inclusion in the shipping kit and processing of the samples. The railroad representative shall request an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. One Form 6180.73 shall be forwarded in the shipping kit with each group of samples. One Form 6180.74 shall be forwarded in the shipping kit for each employee who provides samples.

(c) *Shipping kit.* (1) FRA and the laboratory designated in Appendix B to this part make available for purchase a limited number of standard shipping kits for the purpose of routine handling of toxicological samples under this subpart. Whenever possible, samples shall be placed in the shipping kit prepared for shipment according to the instructions provided in the kit and the Field Manual. Specifications for kits are contained in the Field Manual.

(2) Kits may be ordered directly from the laboratory designated in Appendix B to this part.

(3) FRA maintains a limited number of kits at its field offices. A Class III railroad may utilize kits in FRA possession, rather than maintaining such kits on its property.

(d) *Shipment.* Samples shall be shipped by pre-paid air freight (or other means adequate to ensure delivery within twenty-four (24) hours) to the laboratory designated in Appendix B to this part. If courier pickup is not available at the medical facility where the samples are collected, the railroad shall promptly transport the shipping kit holding the samples to the nearest point of shipment via air freight or equivalent means.

[50 FR 31568, Aug. 2, 1985, as amended at 52 FR 10576, Apr. 2, 1987]

§ 219.207 Fatality.

(a) In the case of an employee fatality in an accident or incident described in § 219.201, body fluid and/or tissue samples shall be obtained from the remains of the employee for toxicological testing. To ensure that samples are timely collected, the railroad shall immediately notify

the appropriate local authority (such as a coroner or medical examiner) of the fatality and the requirements of this subpart, making available the shipping kit and requesting the local authority to assist in obtaining the necessary body fluid or tissue samples. The railroad shall also seek the assistance of the custodian of the remains, if a person other than the local authority.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary samples, the railroad shall immediately notify FRA by toll free telephone, Area Code 800-424-0201, providing the following information:

(1) Date and location of the accident or incident;

(2) Railroad;

(3) Name of the deceased;

(4) Name and telephone number of custodian of the remains; and

(5) Name and telephone number of local authority contacted.

(c) A coroner, medical examiner, pathologist, Aviation Medical Examiner, or other qualified professional is authorized to remove the required body fluid and/or tissue samples from the remains on request of the railroad or FRA pursuant to this part; and, in so acting, such person is the delegate of the Administrator under Section 208 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 437) (but not the agent of the Secretary for purposes of the Federal Tort Claims Act). Such qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under these rules.

(d) The Field Manual specifies body fluid and/or tissue samples required for toxicological analysis in the case of a fatality.

§ 219.209 Reports of tests and refusals.

(a)(1) A railroad that has experienced one or more events for which samples were obtained shall provide prompt telephonic notification summarizing such events. Notification shall be provided to the Office of Safety FRA, at (202) 426-0897 (8:30 a.m. to 5:00 p.m. EST or EDT) during the Federal work week.

(2) Each telephonic report shall contain:

(i) Name of railroad;

(ii) Name, title and telephone number of person making the report;

(iii) Time, date and location of the accident/incident;

(iv) Brief summary of the circumstances of the accident/incident, including basis for testing; and

(v) Number, names and occupations of employees tested.

(b) If the railroad is unable, as a result of non-cooperation of an employee or for any other reason, to obtain a sample and cause it to be provided to FRA as required by this section, the railroad shall make a concise narrative report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. This report shall be appended to the report of the accident/incident required to be submitted under Part 225 of this subchapter.

§ 219.211 Analysis and follow-up.

(a)(1) The laboratory designated in Appendix B to this Part undertakes prompt analysis of samples provided under this subpart, consistent with the need to develop all relevant information and produce a complete report.

(2) FRA notifies the railroad and the tested employee of the results of the toxicological analysis and permits the employee to respond in writing to the results of the test prior to preparing any final investigation report concern-

ing the accident or incident. Results of the toxicological analysis and any response from the employee are also promptly made available to the National Transportation Safety Board on request.

(b)(1) The toxicology report may contain a statement of pharmacological significance to assist FRA and other parties in understanding the data reported. No such statement may be construed as a finding of probable cause in the accident or incident.

(2) The toxicology report is a part of the report of the accident/incident and therefore subject to the limitation of Section 4 of the Accident Reports Act (45 U.S.C. 41) (prohibiting use of the report for any purpose in any action for damages).

(c)(1) It is in the public interest to ensure that any railroad disciplinary actions that may result from accidents and incidents for which testing is required under this subpart are disposed of on the basis of the most complete and reliable information available so that responsive action will be appropriate. Therefore, during the interval between an accident or incident and the date that the railroad receives notification of the results of the toxicological analysis, any provisions of collective bargaining agreements establishing maximum periods for charging employees with rule violations, or for holding an investigation, shall not be deemed to run as to any offense involving the accident or incident (*i.e.*, such periods shall be tolled).

(2) This provision shall not be construed to excuse the railroad from any obligation to timely charge an employee (or provide other actual notice) where the railroad obtains sufficient information relating to alcohol or drug use, impairment or possession or other rule violations prior to receipt of toxicological analysis.

(3) This provision does not authorize holding any employee out of service pending receipt of toxicological analysis; nor does it restrict a railroad from taking such action in an appropriate case.

(d) Each sample provided under this subpart is retained for not less than six months following the date of the accident or incident and may be made available to the National Transportation Safety Board (on request) or to a party in litigation upon service of appropriate compulsory process on the custodian of the sample at least ten (10) days prior to the return date of such process. It is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation unless a copy of the subpoena, order, or other process is contemporaneously served on the Chief Counsel, FRA, Washington, DC.

[50 FR 31568, Aug. 2, 1985, as amended at 52 FR 10576, Apr. 2, 1987]

§ 219.213 Unlawful refusals; consequences.

(a) *Disqualification.* (1) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months.

(2) The disqualification required by this paragraph shall apply with respect to employment in covered service by any railroad with notice of such disqualification.

(3) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(b) *Procedures.* (1) Prior to or upon withdrawing the employee from covered service under this section, the

railroad shall provide notice of the reason for this action and an opportunity for hearing before a presiding officer other than the charging official. This hearing may be consolidated with any other disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer shall make separate findings as to the disqualification required by this section.

(2) The hearing shall be convened within the period specified in the applicable collective bargaining agreement. In the absence of an agreement provision, the employee may demand that the hearing be convened within 10 calendar days of the suspension or, in the case of an employee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the charged employee becomes available for hearing.

(3) A post-suspension proceeding conforming to the requirements of an applicable collective bargaining agreement, together with the provisions for adjustment of disputes under Section 3 of the Railway Labor Act, shall be deemed to satisfy the procedural requirements of this paragraph.

(c) *Subject of hearing.* The hearing required by this section shall determine whether the employee refused to submit to testing, having been requested to submit, under authority of this subpart, by a representative of the railroad or an FRA representative. In determining whether a disqualification is required, the hearing official shall, as appropriate, also consider the following:

(1) Whether the railroad made a good faith determination, based on reasonable inquiry, that the accident or incident was within the mandatory testing requirements of this subpart; and

(2) In a case where a blood test was refused on the ground it would be inconsistent with the employee's health, whether such refusal was made in good faith and based on medical advice.

Subpart D – Authorization to Test for Cause

§ 219.301 Testing for reasonable cause.

(a) *Authorization.* A railroad may, under the conditions specified in this subpart, require any covered employee, as a condition of employment in covered service, to cooperate in breath or urine testing, or both, to determine compliance with § 219.101 of this part or a railroad rule implementing the requirements of § 219.101. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service). The provisions of this subpart apply only when, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section.

(b) *Reasonable cause for breath tests.* The following circumstances constitute reasonable cause for the administration of breath tests under this section:

(1) *Reasonable suspicion.* A supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol, or alcohol in combination with a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee;

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under Part 225 of this title, and a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

(3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors:

(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to movement of a train that involves—

(A) Occupancy of a block or other segment of track to which entry was not authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consist [*sic*] with § 218.37 of this title;

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule or operation of a switch under a train;

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes; or

(vii) In the case of a person perfoming a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

(c) *Reasonable cause for urine test*—

(1) *Accident/incident and rule violation.* Except as provided in paragraph (c)(2) of this section, each of the conditions set forth in paragraphs (b)(2) ("accident/incident") and (b)(3) ("rule violation") of this section as constituting reasonable cause for breath testing also constitutes reasonable cause with respect to urine testing.

(2) *Reasonable suspicion.* Reasonable cause also exists where a supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled susbstance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee, subject to the following limitations:

(i) An employee be required to submit to urine testing for reasonable suspicion only if the determination is made by at least two supervisory employees; and

(ii) If the determination to require urine testing is based upon suspicion that the employee is under the influence of or impaired by a controlled substance, at least one supervisory employee responsible for the decision to require urine testing must have received at least three (3) hours of training in the signs of drug intoxication consistent with a program of instruction on file with FRA under Part 217 of this title. Such program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of the major drug groups on the controlled substances list (narcotics, depressants, stimulants, hallucinogens, and marijuana).

(d) *Preference for breath test where alcohol suspected.* If an employee is specifically suspected only of being under the influence of or impaired by alcohol, breath testing is the preferred means of confirmation. The railroad shall conduct a breath test before requiring a urine test unless to do so would not be feasible because of unavailability of a testing device or other considerations of safety or efficiency.

(e) *Limitation for Subpart C events.* The compulsory urine testing authority conferred by this section does not apply with respect to any event subject to post-accident

toxicological testing as required by § 219.201 of this part. However, use of compulsory breath test authority is authorized in any case where breath test results can be obtained in a timely manner at the scene of the accident and conduct of such tests does not materially impede the collection of samples under Subpart C.

(f) *Time limitation.* Nothing in this section shall authorize testing of an employee after the expiration of an 8-hour period from the time of the observations or other events described in this section.

(g) *Construction.* Nothing in this subpart requires a railroad to undertake breath testing as a requisite to any disciplinary action or restricts the discretion of a railroad to proceed based solely on evidence of behavior, personal observations, or other evidence customarily relied upon in such investigations or hearings.

[50 FR 31568, Aug. 2, 1985, as amended at 50 FR 50889, Dec. 12, 1985]

§ 219.303 Breath test procedures and safeguards.

(a) Except as provided in paragraph (d) of this section, the following conditions apply to breath testing authorized by this subpart.

(1) Testing devices shall be selected from among those listed on the Conforming Products List of Evidential Breath Measurement Devices amended and published in the FEDERAL REGISTER from time to time by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation. This listing is also contained in the current Field Manual.

(2) Each device shall be properly maintained and shall be calibrated by use of a calibrating unit listed on the NHTSA Conforming Products List of Calibrating Units for Breath Alcohol Testers (as amended and published and

contained in the current Field Manual) with sufficient frequency to ensure the accuracy of the device (within plus or minus .01 percent), but not less frequently than provided in the manufacturer's instructions.

(3) Tests shall be conducted by a trained and qualified operator. The operator shall have received training on the operational principles of the particular instrument employed and practical experience in the operation of the device and use of the breath alcohol calibrating unit (reference standard). A copy of the training program shall be filed with FRA in conjunction with the filing required by § 217.11 of this title.

(4) Tests shall be conducted in accordance with procedures specified by the manufacturer of the testing device, consistent with sound technical judgment, and shall include appropriate restrictions on ambient air temperature.

(5) If an initial test is positive, the employee shall be tested again after the expiration of a period of not less than 15 minutes, in order to confirm that the test has properly measured the alcohol content of deep lung air.

(b) Because of the inherent limitations of the instrumentation, any indicated breath test result of less than .02 percent shall be deemed a negative test.

(c) In any case where a breath test is intended for use in the railroad disciplinary process and the result is positive, the employee shall be given the prompt opportunity to provide a blood sample at an independent medical facility for analysis by a competent independent laboratory. The railroad shall provide the required transportation to facilitate the blood test.

(d)(1) Under the circumstances set forth in § 219.301, a railroad may require an employee to participate in a screening test solely for the purpose of determining

whether the conduct of a test meeting the criteria of paragraph (a) of this section is indicated. If the screening test is negative within the meaning of paragraph (b) of this section, the employee shall not be required to submit to further breath testing under this subpart. If the screening test is positive, no consequence shall attach except that the employee may be removed from covered service for the period necessary to conduct a breath test meeting the criteria of paragraph (a) of this section or a urine test meeting the requirements of §§ 219.305 and 219.307 of this subpart (consistent with § 219.301(d) of this subpart).

(2) Except as provided in paragraph (d)(2)(iii) of this section, the conduct of a screening test under paragraph (d)(1) of this section does not excuse full compliance with paragraph (a) of this section with respect to any breath test procedure which is then undertaken. If a screening test is positive, the following procedures govern:

(i) An initial breath test shall be conducted meeting the criteria of paragraph (a) of this section.

(ii) If that test is positive, a second breath test shall be conducted meeting the criteria of paragraph (a) of this section.

(iii) The second test meeting the criteria of paragraph (a) of this section must be conducted at least 15 minutes after the positive screening test conducted under paragraph (d)(1) of this section. However, since a waiting period of 15 minutes is sufficient to permit the dissipation of any alcohol in the mouth, the requirement of paragraph (a)(5) of this section that there be a period of at least 15 minutes between the two tests meeting the criteria of paragraph (a) of this section does not apply.

[50 FR 31568, Aug. 2, 1985, as amended at 50 FR 38661, Sept. 24, 1985; 50 FR 45407, Oct. 31, 1985]

§ 219.305 Urine test procedures and safeguards.

(a) Urine shall be collected at an independent medical facility. Personnel of the medical facility shall supervise the collection procedure.

(b) The railroad shall establish procedures with the medical facility and the laboratory selected for testing to ensure positive identification of each sample and accurate reporting of laboratory results.

(c) A urine test procedure may include the provision of not more than two samples from the same employee.

(d) In any case where a urine test is intended for use in the railroad disciplinary process, the employee shall be given the opportuntiy to provide a blood sample at the independent medical facility for analysis by a competent independent laboratory.

(e) Nothing in this subpart restricts any discretion available to the railroad to request or require that an employee cooperate in additional body fluid testing.

§ 219.307 Standards for urine assays.

(a) *Laboratory standards.* A railroad employing the urine testing authority conferred by this subpart shall ensure that—

(1) Urine testing authorized by this part shall be undertaken only by an independent laboratory (or laboratories) proficient in the testing of urine for alcohol and drugs of abuse.

(2) Each such laboratory that performs a confirmatory procedure under paragraph (b) of this section shall regularly participate in an external quality control program that involves the analysis of samples submitted by a reference laboratory. Quality control samples should include actual body fluid samples previously analyzed by the

reference laboratory, and should not be limited to spiked samples. Where practicable, known samples shall be submitted to the laboratory on a blind basis (so that the source of the sample is believed to be a customer of the laboratory).

(b) *Screening and confirmation.* Each sample shall be analyzed by a method that is reliable within known tolerances. If the screening test is positive for a substance other than alcohol, a remaining portion of the same sample shall be retested by another method. The confirmation test shall utilize a scientifically-recognized method capable of providing quantitative data specific to the drug (or metabolite(s)) detected. An immunoassay (including a radio immunoassay) is not an acceptable confirmatory test for this purpose.

(c) *Laboratory reports.* (1) Reports of positive urine tests shall, at minimum, state:

(i) The type of test conducted, both for screening and confirmation;

(ii) The results of each test; and

(iii) The sensitivity (cut-off point) of the methodology employed for confirmation, and (iv) any available information concerning the margin of accuracy and precision of the quantitative data reported for the confirmation test (or, in the case of alcohol, for the single test procedure). However, in the case of a negative test (either for screening or confirmation), the report shall specify only that the test was negative for the particular substance.

(2) A legible copy of the laboratory report shall promptly be made available to the employee tested.

§ 219.309 Presumption of impairment; notice

(a) If an employee's urine sample has tested positive for a controlled substance (or its metabolite(s)) in a test

authorized by this subpart and the employee was afforded and declined the opportuntiy to provide a blood sample, the railroad (or a board of arbitration) may, in the absence of persuasive evidence to the contrary, presume from the presence of the identified controlled substance that the employee was impaired by that controlled substance within the meaning of § 219.101 of this subpart.

(b)(1) Each railroad that utilizes the urine testing authority conferred by this subpart shall provide effective notice of the presumption created by this section to each of its covered employees. A railroad is deemed to have provided such notice if it includes a statement similar in substance to the statement set forth in paragraph (b)(2) of this section in its book of rules, timetable, special instructions, or other publication that is made available to each covered employee and with which each such employee is required to be familiar.

(2) The following statement provides the required notice:

> Under Federal Railroad Administration (FRA) safety regulations, you may be required to provide a urine sample after certain accidents and incidents or at any time the company reasonably suspects that you are under the influence of, or impaired by, drugs while on duty. Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to *sixty* days before the sample is collected). As a general matter, the test cannot distinguish between recent use off the job and current impairment. However, the Federal regulations provide that if only the urine test is available, a positive finding on that test will support a presumption that you were impaired at the time the sample was taken.

You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. The blood test will provide information pertinent to current impairment. Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.

If you have used any drug off the job (other than a medication that you possessed lawfully) in the prior sixty days, it may be in your interest to provide a blood sample. If you have not made unauthorized use of any drug in the prior sixty days, you can expect that the urine test will be negative; and you may not wish to provide a blood sample.

You are not required to provide a blood sample at any time, except in the case of certain accidents and incidents subject to Federal post-accident testing requirements (49 CFR Part 219, Subpart C).

A complete copy of the Federal regulations is available for your review at _____.

(3) A railroad that has a policy that forbids off-the-job use of drugs (not involving a specific proof that the employee is under the influence of the substance or impaired by it on the job) must include in such a notice a statement concerning any additional consequences of a positive urine test.

U.S. GOVERNMENT PRINTING OFFICE: 1988--202-037/60335